

Buckley v. Valeo

Oral Argument - November 10, 1975

Warren E. Burger

We will hear arguments today in Buckley against Valeo and the others.

Counsel, you may proceed whenever you are ready.

Ralph K. Winter, Jr.

Mr. Chief Justice and may it please the Court.

This case was brought on January 2nd of this year, first business day after the effective date of the Federal Election Campaign Act amendments of 1974, which I will refer to as the FECA.

It is about a declaratory judgment of unconstitutionality and a permanent injunction against the enforcement of major provisions of that law, the 1971, Federal Election Campaign Act in subtitle H of the Internal Revenue Code as amended by the FECA Amendments.

Pursuant to the expedited review provisions, the case was certified to the Court of Appeals for the District of Columbia Circuit, after a remand to the District Court for fact finding, a framing of the constitutional issues and a re-certification to the Court of Appeals.

The Court of Appeals and a three-judge district court considering always subtitle H, rendered their opinions on August 15.

The majority below upheld the constitutionality of every major provision of the law, but one and that provision was not appealed and is not an issue here.

The allocation of argument for both sides will be as follows.

I will discuss the statutory limits on campaign expenditures by political parties, committees and candidates, limits on contribution to political candidates and limits on independent expenditures.

My colleague Mr. Gora will discuss the challenge to the Act's disclosure provisions and this afternoon, Mr. Clagett will argue the unconstitutionality of federal subsidies to political candidates and parties and of the Federal Election Commission.

For the Appellees, Mr. Friedman will discuss general principles and the disclosure provisions.

Mr. Cox will discuss the limits on expenditures and contributions.

In the afternoon, Mr. Cutler will discuss subtitle H and Mr. Spritzer, the constitutional alibi of the Federal Election Commission.

Let me briefly describe the statutory provisions relevant to my portion of argument.

Candidates for all federal offices are limited by Section 608 in the amounts they may spend for purposes of influencing on election.

National committee and State committees of a political party, may make expenditures on behalf of candidates which are in addition to the candidate's expenditures.

Section 608 (e) prohibits expenditures independent of the candidate in excess of \$1,000.00 so long as they are relative to a truly identified candidate and advocating the election or defeat of such candidate.

The statute also limits contributions to candidates.

No person may contribute in excess of \$1,000.00 to any candidates for Federal Office and political committees registered for 6 months, which have received contributions for more than 50 persons and have contributed to 5 or more candidates for Federal Office may make contributions to individual candidates up to \$5,000.00 each?

Candidates may expend personal funds or the funds of their immediate family up to \$50,000.00 in the case of a candidate for President, \$35,000.00 in the case of a candidate for the Senate and \$25,000.00 in the case of a candidate for the House.

Certain incidental out of pocket expenses incurred by volunteers in excess of \$500.00 would constitute a contribution.

Potter Stewart

Some of these limitations are annually, you can spend that much in any one year, is that true of all of them?

Ralph K. Winter, Jr.

No, most of the limitations apply to primary or to (Voice Overlap) --

Potter Stewart

To specific by the general explanation --

Ralph K. Winter, Jr.

Races for the nomination and then also for the general election and in some cases they are different limits, depending on whether it is a primary or general election.

Potter Stewart

But I am correct in my understanding that some of them do permit annual expenditures or contributions of that amount?

Ralph K. Winter, Jr.

Well, I am not sure exactly what you mean, Justice Stewart.

Potter Stewart

Well, I am just asking a question?

Ralph K. Winter, Jr.

I believe, 608 -- well, certainly the limits on expenditures apply to --

Potter Stewart

You would have a federal election every two years?

Ralph K. Winter, Jr.

That is right.

Potter Stewart

The Presidential every four and Congressional every two?

Ralph K. Winter, Jr.

Well, the limits on expenditures apply to each separate election and it is not annual.

The limits are independent expenditures in a year, so that is just the annual expenditure.

Potter Stewart

Still I am not quite sure I understand the answer to my question?

Ralph K. Winter, Jr.

Well, I think my answer is not --

Potter Stewart

It is not year.

Ralph K. Winter, Jr.

It is not slightly annual as I understand that the --

Potter Stewart

They are geared to Federal Election?

Ralph K. Winter, Jr.

That is right.

Potter Stewart

And this is in anytime during the Federal Election Years.

Ralph K. Winter, Jr.

Yes.

Potter Stewart

Is that it?

Ralph K. Winter, Jr.

I think so, yes.

Harry A. Blackmun

Which is to say the definition of years in relation to the election not as an account?

Ralph K. Winter, Jr.

That is right.

Harry A. Blackmun

Is that it?

What difference does it make?

Ralph K. Winter, Jr.

Yes, I am not sure it makes any different, sir.

Warren E. Burger

But it would make a difference I suppose if some candidate was thinking about it and with one course of action he might be subject to a criminal charge or other sanctions and with the other course of action he would be in clear?

Ralph K. Winter, Jr.

Well, that is certainly true, but the definition of expenditure is for the purpose of influencing an election and that is a factual determination to be made in each case as to which election the particular expenditure was designed to, you know, was intended to influence.

So, that conceivably under the Act, I take it that expenditures prior to a primary, prior to a nomination can be said by the FECA, by the Commission, or by a Court interpreting it, to in fact, have been for the purpose of General Election.

One of the principles duties of the Federal Election Commission will be to allocate to make a determination which expenditures in particular cases are for the purpose of which election.

The parties disagree as to the extent of Congressional Power to regulate political communication under the First Amendment, but they all agreed on one thing, which is that a statute which intrudes in a delicate area of this matter must be non-discriminatory on its face.

For if it were not the state would be able to regulate the unpopular and in effect regulate the content of speech.

I want to confront directly in detail the contention that the FECA is not facially discriminatory, for there are several theory cases official unconstitutionality.

Section 608 limits contributions to and expenditures by candidates as defined in Section 591, essentially if anything of value, given or employed to influence a federal election.

Title 39, U.S.C., Section 3210 which is on page 81 of our volume 3 of the appendix, that subsection E and F explicitly makes explicit exceptions to the definitions of contribution and expenditures.

What the exceptions are, are funds used in preparing materials to be sent out under the frank as well as the postal value of sending it out.

Section 3210 (a) (3) defines the kinds of materials that maybe sent out under the Frank.

That describes a variety of relevant materials which clearly influence elections.

But most particularly, it includes "discussions of proposed or pending Legislation or Governmental actions and the positions of the members of Congress on and arguments for or against such matters."

The only limitation is that Frank cannot be used within 28 days in election.

Now, since the presentation of arguments for and against actions by Congress obviously influence elections.

The effect is that Section 608 limits all contributions to or expenditures by challengers for purposes of mailings which debate governmental issues, while leaving totally unregulated and unlimited private contributions to incumbents to prepare materials which is then sent out in unlimited amounts at government expense.

No party to this litigation so far as I know disagrees with this interpretation of the statute.

Indeed, even in the proposed regulations of the Federal Elections Commission relating to office accounts, the Commission was at pains not to treat funds supporting the activities described in Section 3210 as either contributions or expenditures.

The issue we raise is not whether a congressman should be able to communicate with their constituents.

The issue is whether Congress under the First Amendment made by law, limit the ability of challengers to communicate with the very same constituents without similarly limiting itself.

Of course, public officials need to communicate with voters, but so do challengers and if private contributions to challengers for use in mailing are to be limited, since they may corrupt or give the wealthy an unequal voice, then contributions to incumbents for the same purpose should also be limited.

The situation this statute establishes permits an incumbent congressman say in plausible hypothetical, to accept \$40,000.00 from a source, any source, which can then be used to prepare and it does not have to be disclosed, which can then be used to prepare materials.

You can give the money, you can hire an advertising firm to prepare materials which can then be sent out under the Frank.

So that an incumbent congressman might except, give an advertising agency say \$35,000.00 to prepare materials, send out a 150,000 copies of something, which I suppose is worth maybe around \$15,000.00, none of which accounts either as a contribution or an expenditure.

If the challenger were to do exactly the same thing, with matters debating the pros and cons of governmental action, it would all be subject to the limits and indeed, in the hypothetical I have given, a challenger in the House would have used that well over half the expenditure limit and that is before he has hired his lawyer and his accountant to help them comply with the statute.

Potter Stewart

Is this -- are you directing yourself to the Fifth Amendment attack or First Amendment attack or both?

Ralph K. Winter, Jr.

I think it is both, Justice Stewart.

It seems to me that it is a Fifth Amendment attack in that it is an invidious discrimination, but it is also a First Amendment attacking in that it clearly regulates content.

It permits more speech, greater speech by incumbents than by challengers.

I think it is almost exactly the case that the Court decided in Police Department against Mosley, involving a statute that prohibited all picketing, but picketing by a labor organization.

So, I think that the attack goes on both grounds.

Now, if that is not a facial discrimination then these words have lost their meaning.

It is not a minor exception.

Potter Stewart

(Voice Overlap) does not have much to do with discrimination as such does it?

The Fifth Amendment does, of course?

Ralph K. Winter, Jr.

Yes, it does.

I find it difficult, Justice Stewart though to see why a statute which prohibits the speech of some, but not others in a discriminatory fashion does not violate the First Amendment.

Potter Stewart

If the advice is directed to the content, it certainly does.

Ralph K. Winter, Jr.

Well, that is content in a very real, very, very real sense and not only that the First Amendment at the core is the protection of those outside the government.

This smacks very much of the repression of political opponents in that people outside the government are not allowed to speak as much as people in and I think that is -- if the Court finds the statute does that, it is a clear violation of First Amendment.

It is not a minor exception.

It involves millions and millions of dollars.

More money is found in the Frank by congressman then spent by all congressional challengers and all campaign activities.

In October 1974 on the eve of the congressional election the Congress which past Section 608, set out almost \$22 million pieces of Frank mail and the budget for 1976, includes \$46 million for use of the Frank.

Challengers to Congressional incumbents in 1974 spent only slightly \$20 million on everything. Let me make it clear, we claim no misused of the Frank.

We do not say, 3210 is unconstitutional.

It serves legitimate official purposes, separating the proper use of the Frank from the improper use is simply intractable.

It would make every mailing of the Frank a constitutional issue.

But the Frank does influence elections and as stipulated by the parties and found by the District Court, its heaviest use is just prior to election.

Attempts in Congress by Senator Scott to have the mailing privileges given to a challenger, given to all candidates for Federal office had been defeated.

It seems to me that the Frank cannot be using this word or that you cannot limit challengers in responding without even giving them Franking privileges or limiting Congress' own use of it.

We do not abandon by means all of the the contentions, but if the Court were to find that these provisions are unconstitutional for these reasons, that would dispose of both contributions and expenditures under 608 and the other constitutional issues can be left to another day.

Byron R. White

It was out before the Senate and House --?

Ralph K. Winter, Jr.

Yes, sir.

Not, yes sir, the presidency might be different because it is penalty mail, but I would submit that it --

Byron R. White

You have to say something else about the case, about the presidency case?

Ralph K. Winter, Jr.

Yes sir.

The penalty mail situation, sir is precisely the same.

The president also has mailing privileges which are very similar to those which incumbent congressman have.

I would think that it would clearly -- that the theory would clearly fit within that and although 3210 does not explicitly make the same kind of explicit exception to fit to the 591 definitions, the case there is exactly the same.

The President is permitted to send out mailings like that.

The statute, I should say that basically this argument I think is applicable to all of the many resources which are available to incumbents which they can vote themselves at will and which are detailed in the briefs and in the papers of the party and I will not go into it.

I emphasized 3210 because it did have that explicit statutory language.

The FECA also and this applies to all Federal races, officially discriminates against independent candidates for office by permitting party committees to support their candidates over and above the candidate expenditure limit.

Candidate such as Senator McCarthy who wish to demonstrate their independence from traditional political alliances can do so only at the price of having less power to communicate with voters.

No matter how often the word Watergate is repeated, it really offers no valid explanation much less justification.

Forth, although the statute was passed in the midst of rhetoric about reducing the influence of wealth and politics, in fact increases the advantage of wealthy candidates.

The less wealthy candidate is prohibited from rising seed money or contributions for other purposes in amounts over a \$1,000.00.

The wealthy candidate on the other hand can support his campaign from personal funds, including large early initial loans to the campaign which can later be repaid.

No reason which would stand the scrutiny has been given to justify giving the wealthy disadvantage in communication with the voters.

Fifth, we also claim to this facial discrimination for the statute to permit large contributions by political committees which have been registered for six months.

They are permitted to spend five times as much other kinds of committees and we believe that provision necessarily will help groups which have permanent organization, which have continuous professional contact, namely organized interest groups.

Ideological groups are less well knit.

Their members are dispersed.

They are not in continuous professional contact.

They tend to be generated by campaign activities which will occur too late for compliance for the six months requirement and they tend to call it less only in response to unanticipated events.

It is certainly true that more ideological organizations such as the national committee for an effective Congress or the conservative victory fund will continue to exist.

They will, however, be limited by the \$5,000.00 limit and will be less able to proliferate the number of six months committees in existence.

Organized interest groups, at least those with a geographic basis, which can organize horizontally are able to proliferate committees and that is why it seems to us that is very clear that the practice of this industry which have been heavily relied upon in the Court below can continue to occur under the statute, since they can organize their political committees on a county basis.

Contrary to the rhetoric which accompany passage of the FECA, the statute in particular favors the use of corporate and union money for political activities.

Both are permitted to spend statutorily unlimited sums to raise money for so called segregated funds to finance six-month political committees.

Union or corporate money is thus spent to raise money and that money is distributed without reference to the wishes to the donors.

In effect to some extent, the FECA reformed the problem of legal corporate contributions when making them less necessary.

Sisson speculation, since the enactment of the statute, there has been very sharp increase in the number of corporate political action committees with no visible increase in illogically oriented groups.

I should say that the change statute made was to include corporations with government contracts in their provisions permitting corporations to setup segregated funds.

Six, whatever facial neutrality the statute may have, it is only skin deep.

In its operation it inevitably works great discrimination among various candidates and various causes.

Candidates and political movements never began from positions of equality.

Some who are initially disadvantaged moreover can overcome this disadvantage only by heavy spending, no matter how much the opponent spends.

Differences in name recognition, disadvantages on the issues.

The record indicates, for example, in 1972 that Attorney General Kelly may well have been able to raise, wage a stronger race against Senator Griffin, had he been able to obtain a level of campaign spending, enabling him to focus the voters attention more on economic issues in which he was thought to be strong, rather than on the raging busing controversy where he was thought to be weak.

In that kind of situation the busing was a controversial issue, independent of any activities of Senator Griffin could be overcome only by a vigorous campaign by Senator Kelly, no matter how many resources were available to Senator Griffin.

Appellees believe these propositions are common sense propositions.

We do not think there is speculation at all.

Indeed, they are now the law of the FECA, according to a ruling of Commission.

In an advisory ruling, involving Senator Benson, the Commission explicitly relied on the fact that an incumbent's exposure is the equivalent of substantial campaign expenditures.

Senator Benson has announced that he intends to run in both the Texas Presidential and Senatorial primaries.

The Commission, fearful that his combined expenditures will influence each of these simultaneous campaigns, ruled that Senator Benson may only spend the amount permissible for the Senate primary, all together.

His major anticipated adversary in the Presidential primary, Governor Wallas was less free to outspend him two to one since Presidential Primary Candidates can spend twice the Senate limit.

In handing down this ruling, the Commission said "within Texas, the reduced Presidential Primary expenditure limitation applicable to Senator Benson are compensated for by the fact that he is already the Senator from Texas and thus within Texas begins with the significant exposure advantage over his rivals.

William H. Rehnquist

Mr. Winter, how much can we get into a particular ruling like that.

I mean, Senator Benson is not a party here, Governor Wallas is not a party?

Ralph K. Winter, Jr.

The point I am making, Justice Rehnquist is at while the Commission in this Court is claiming that kind of proposition as speculation and would not justify the Court holding expenditures limits unconstitutional for the reasons I have said.

Now, the point is that they themselves are relaying on that proposition to make decisions below.

I am not arguing whether the ruling was correct or incorrect.

I am just arguing that it is a well-known proposition known to everyone.

So, well known that Commission relied on it and had no problems whatsoever.

I think these propositions are as much common sense propositions as the proposition that equal space statute say in Tornillo, made Detroit Newspapers from printing controversial editorials.

I think every First Amendment of this Court involves judgments as to the factual impact of the statute.

William H. Rehnquist

But in Tornillo we were discussing the language of the statute as such as applied by the Florida Courts and here you are asking us to take into a considerations a ruling by the Commission in a particular controversy?

Ralph K. Winter, Jr.

I am only asking you to take the rationale of the consideration.

I am not asking you to address yourself to the merits of whether Governor Wallas and other Presidential aspirants should be able to outspend Senator Benson two to one.

I think the merits of that are irrelevant to the argument here, except insofar as they demonstrate the belief of those, the widespread belief that exposure is the equivalent of substantial campaign expenditures.

They are also relevant I might say to show the kind of deep intrusion the statute makes in that the Commission will be asked time and again to address the question, how much will this candidate be able to speak in election and how much will another.

I am not sure, I am being responsive Justice Rehnquist.

I think that similar disadvantages are visited upon challengers by the limits on contributions.

Incumbents are as we described in our papers, large advantages in raising contributions under the statute because of mailing list they develop from the Frank and the like.

Indeed, although one might have anticipated that fundraising would be more difficult, the figures show that by September 30th of this year, incumbent Senators up the next time have already raised over \$2 million.

At a corresponding time in 1974, they have raised less than a million-and-a-half.

So, they are not having any trouble raising it because they have all of this time to raise it which challengers do not and time is critical when you are raising small contributions.

There is one argument; well, the argument that the statute helps challengers because offsets the superior fund raising ability of incumbents seems to us to be an error.

The greatest differential in funds is in those races in which the challengers simply as little or no plausible chance of election.

The limits in those circumstances have little impact because the outcome is certain and because spending is often less than the limits.

The impact in those races which are competitive, however, will be drastic, but those races are the very races in which the differential in funds is leased.

In 1974, in the House, if you take all the races in which the challenger did raise 70,000 or more, the amount raised by all such challengers in fact substantially exceeded the amounts raised by the incumbents is they faced.

The limits already have an effect on those races where equality is greatest at the present moment.

The burden of the FECA rest full heavily on those challenging the status quo by impairing the ability of challengers both to raise and spend money.

This legislation makes it acutely difficult for them to overcome the exposure, incumbents already enjoy.

I do not think there could be any question about this.

If they were five restaurants in the town and someone was about to open a new one, an ordinance severely limiting the amount of newspaper advertising restaurants might buy, would be recognized for what it is, an attempt by the existing restaurants to freeze out new comers.

I do not make claim of intent on the part of Congress to drive out and to freeze out new comers.

I do claim, however, that the effect will be to do that.

I think the record demonstrates these propositions.

The vast majority of Congressional challengers in the last two elections have spent over what are now the FECA limits, if appropriate adjustments were made for inflation.

Senator McCarthy's 1968 New Hampshire campaign, which seemed hopeless in the beginning, which was widely reported as a campaign run mostly by volunteers was in fact a very heavily monied campaign, one of the most money campaigns up to date.

Senator McCarthy spent \$12.00 per vote received as against \$.077 spent in the General Election by Richard Nixon that it -- and it adjusted for inflation, that is around \$18.00.

If his spending had been otherwise, the outcome would been otherwise and had been limited, the outcome would been otherwise and the efforts of his many volunteer supporters, who are also helped by the heavy spending would have been for naught.

The same is true of the reliance of challengers on large contributions.

Again, the McCarthy Campaign in 1968 is detailed in the record, as is Senator Buckley's 1970 campaign in which the landlords and the phone company would not even talk to him, unless he came up with certified checks for \$36,000.00.

His beginning efforts were financed through a large loan which the FECA would outlaw.

The record also demonstrates beyond any question that Senator McGovern's campaign would have floundered if the FECA had been in effect.

From the beginning of his campaign, until the New Hampshire Primary, until three days after the New Hampshire Primary, Senator McGovern would have lost \$636,882.00 in contributions.

Since direct mail techniques in which he was relying heavily, required the much of the return -- the much of the contributions of the return on contributions be plowed back in, these large contributions had to be critical to his early efforts.

The answer to the question is this law that reform a claims to be is clearly no, quite apart from its discriminatory effect.

There is no rational relationship between stated ends and the means adopted.

In fact, there are remedies which are available, are readily available with greater efficacy and had considerably less impact on First Amendment values.

The record demonstrates something about the effectiveness of disclosure.

In going to the record, it appears in 1972 that large, large numbers of the large contributions and the suspicious contributions which led to the passage of the FECA were passed before the disclosure provisions were in effect or after the election when it was too late for them to go before the record.

The appellees state that 153 contributors give \$20 million to the Nixon Campaign.

From the source they sighted, we calculate that \$16 million of that was given before April 7, 1972.

All parties have agreed and District Court found that there was no effective disclosure before that date.

Indeed on April 5th and April 6th \$5.5 million was raised and a total of 20 million was raised by the Nixon Campaign before the disclosure date.

Great finding 147 on page 204 to 205 of appendix 2, lists contribution solicited by Herbert Colenback (ph), 83% were made before April 7th.

Great finding 124, page 155, lists contributions by Ambassadors appointed by President Nixon.

Thurgood Marshall

Mr. Winter from reading the briefs from the other side with all their figures and all these things you have been throwing at us for the last half hour, where are we going to put them all in the computer?

Ralph K. Winter, Jr.

I do not think that the figures that I have been throwing at you were Justice Marshall need to go in a computer.

It seems to me that these --if this statute --

Thurgood Marshall

In the first place, we do not have one.[Laughter]

Ralph K. Winter, Jr.

That made my answer to the question easy.

It seems to me that most of the figures that are there, are fairly clear in their import and there is another factor which I think is critical, that is, if the statute is upheld, you lose the controller group.

You will never again have high spending challengers to look to, to see whether this high spending is necessary for them to defeat incumbents.

Once the statute is in effect and running, there will be no more figures before any Court to be able to demonstrate what effect the statute is having.

These are the only figures that ever going to be available to make a thorough judgment on the constitutionality of this law.

The only figures you will have from now on would be incumbency rate.

You will never know whether high spending challenge -- whether high spending is necessary to challengers or not.

The figures I am discussing right now, demonstrate in their totality, only that large contributors and contributors with improper motives fear disclosure to the voters.

William H. Rehnquist

Well, Mr. Winter is it your contention that these people would not have contributed, had they had to do so under a disclosure requirement?

Ralph K. Winter, Jr.

I think that is very likely true in a large number of cases.

I would think --

William H. Rehnquist

What is your basis for it?

It does not seem to me it is proved by showing that because they could contribute without any disclosure before April 7th, they choose to do that rather than to contribute after April 7th?

Ralph K. Winter, Jr.

Well, I think that the best way -- I of course cannot give an equivocal answer that they would not have contributed, but April 7th is a very, very early day and contributions, large contributions after an election are too late for disclosure and particularly in election like 1972 where there was little doubt about the outcome, it seems to me, strongly suggest a powerful desire to avoid disclosure.

Now, whether they would given or not, I do not know.

I suspect the milk people probably would not have.

I suspect in the case of the ambassadorships, they probably would not have, but disclosure does have one virtue that no other remedy has and that is it leaves it to the voter.

Even if they did continue to give, the voter would be able to decide in each case whether he -- whether that voter thought that a particular candidate was going to be overly beholden to, if you want to call them special interest, was receiving too many large contributions from a particular source, whether people will continue to give after effective disclosure depends on what the voters think and that is the way it should be in a democratic system.

William H. Rehnquist

Now, Congress has apparently decided otherwise in this case?

They have said that they do not want people to appear to be beholden, even though the voters knowing that they appear to be beholden would nonetheless elect them.

Is that an impermissible judgment for Congress to make?

Ralph K. Winter, Jr.

Yes, I think it is impermissible for Congress to attempt to bring about these remedies by lowering the level of political communication when disclosure is available and when other remedies are also available.

Remedy such as prohibitions on large late contributions which is certainly a viable remedy, it responds to everything that was cited in support of the FECA and it is not in the statute.

I think that, while Congress in deciding to have disclosure, has considerable discretion in determining what kind of disclosure and when, but I do not think that they can really try, that they can remedy this by stopping essentially political speech.

Certainly limits on candidates expenditures, Justice Rehnquist cannot be justified by any theory that the FECA, any evil the FECA claims the remedy, certainly limits on independent expenditure, it seems to me cannot be justified that way.

The problem has to be, if there is a problem in equality argument and in the argument that the candidates, once they assumed office, will be overly beholden and obligated to certain contributors.

In the case of the equality argument I think it is demonstrated in the record that you cannot bring about equality without producing more inequality, either that or silence itself.

That the challengers, people are challenging the status quo, rely heavily on money and you have to freeze them out in the name of equality and that is wrong.

Second, equality is an impermissible goal in any event because the danger sought to be remedied when you try to reduce equality, inequality in political voice, the danger stems from the communicative nature of the act itself.

It is not like *O'Brien* where you had a congressional purpose unrelated to free speech.

It is like *Tucker* and other cases where the danger was perceived in communicative act.

So, it seems, as for the obligation of candidates, I think candidates are obligated to their voters.

They want votes, they do not want money.

They need money to communicate with the voters and I think their ultimate obligation is to them and I think if there was effective disclosure, they will not become overly burdened with obligations.

I might also say, if you speculate for a moment about when obligations are most likely to be created, it would not be in the case of safe seats, it is only in the case of close or highly competitive seats.

That is where people do need money to run effective campaigns, but those are also cases in which the person has to be the most fearful of what the voters think has to be the most sensitive to voters' wishes.

When you are dealing with safe seats, large contributions do create real dangers, but the remedy for that is to be sure that the candidate receiving the contributions, makes expenditures only for voter persuasion and is not permitted as the present statute does -- permits him, to use campaign funds for a variety of non-speech purposes.

By regulating expenditures you can solve the obligation problem in safe seats.

Now, virtually a large number of the large contributions or improper contributions described in the appendix were made well before April 7th or after the election.

This statute violates I think the coherent and established case law in this Court.

It seems to me in *The New York Times* against.

Sullivan, *Tornillo*, *Mills*, *O'Brien*, *Red Lion* and *Letter Carriers* are not inconsistent.

The principle of non-interference in political communication in every case is consistent with the outcome in those decisions.

It seems to me that this statute, there is no way, that this statute can be viewed other than as an attempt to regulate political communication, indeed to regulate the content of political communication by intricate web of statutory and administrative rulings which redirect and re-channel political speech as well as limit it.

The greatest campaign reform law ever enacted was the First Amendment, relying the proposition that good speech will drive out bad and all appellants ask is, the Court enforce that.

Warren E. Burger

Mr. Gora.

Joel M. Gora

Mr. Chief Justice and may it please the Court.

I will address myself to the disclosure provisions of the challenged legislation and in that argument, I occupy I think a unique role in this preceding in that, these are provisions that we do not challenge as inherently are invalid.

In fact, we think as Professor Winter indicated that disclosure provisions properly and carefully drawn to focus on the problems that generated this legislation, provide the proper solution.

William J. Brennan, Jr.

(Inaudible) is that provisions do this?

Joel M. Gora

They do, but unfortunately, Justice Brennan they do much more than that.

By virtue of their sweep in terms of the coverage and in terms of the depth of reporting, they go well beyond in our submission, the valid area of regulation supported by governmental interests.

Warren E. Burger

You relate that to the amounts?

Joel M. Gora

Yes sir, I do Mr. Chief Justice, both of the amounts in terms of the threshold of reporting and the scope in terms of who is covered.

This statute requires that all political committees must keep a detailed and exact account of the identification that is a statutory term, it means name and residence address, the identification of each person who contributes in excess of \$10.00 a year.

That is a virtual monitoring of everyone who makes a political contribution in the United States.

Similarly, all candidates and political committees, whether they be the committee to re-elect the President or a local small minority party in California, all political committees for all offices have to file reports, disclosing the identity of their contributors in excess of \$100.00 a year.

And finally, any citizen who on his own spends more than \$100.00 a year on Federal politics, independent of any candidate, just goes and prints out some leaflets attacking his local member of Congress, must register and file reports with this Commission, indicating the source and nature of his expenditures.

Lewis F. Powell, Jr.

What is the penalty for failure to comply?

Joel M. Gora

The penalty for non-compliance with the disclosure reporting requirements is I believe a 1-year in jail and I believe it is a thousand dollars fine.

Lewis F. Powell, Jr.

For a citizen who fails to report a hundred dollar contribution?

Joel M. Gora

A hundred dollar independent expenditure contribution.

If I for example, run an ad in the Village Voice in New York or some comparable paper, spend \$125.00 on it saying defeat so and so, vote for so and so, I have to file a detailed report with the Commission, giving the source of my money, how it was spent and so forth.

William J. Brennan, Jr.

But if we were to agree with you and to that extent suppose the provision go to far and strike them to that extent, would you then be satisfied towards that?

Joel M. Gora

Well, striking independent -- the disclosure requirements independent speech --

William J. Brennan, Jr.

Both aspects --?

Joel M. Gora

Yes, I think we would.

I think if this Court were to indicate that the statute reached too deeply in terms of the threshold and swept too widely in terms of the reach, yes, we would be -- that is our position, that it is not properly focused to those interests that the government can properly require disclosure for.

The problem is that the government interests and associational privacy have run up against each other in this area.

Depending on where Congress draws the line, will determine for example for a smaller, unpopular party whether they in their adherence are going to be essentially free from government harassment or have to expose their contributors.

But even for the contributor to a major -- the Democrats or the Republicans the \$125.00 contributor, where the threshold is drawn is going to be determined whether his name might go on an enemies list or not and we suggest that we are --

Potter Stewart

Well accept for it is being very awkward and unwieldy perhaps and maybe impractical to sweep so broadly, how constitutionally does it differ?

How constitutionally it is a greater violation of John Jone's rights to Private Associational confidentiality, if his \$125.00 expenditures needs to be recorded?

How is that a greater violation than it is of Mr. Mott's or Mr. Stone's rights, if as you concede Congress could enact a statutory provision, requiring that he make a disclosure of his million dollar contribution.

Joel M. Gora

I think in principle there is no difference.

However, I think that the disclosure of one's political activities at whatever volume is presumptively invalid, but have the volume of the large contribution, countervailing government interest in informing the electorate of those individuals who make large contributions in preventing corruption, those countervailing interests come into play.

So that that is how I would make the distinction between the interest in knowing in breaching the privacy of the \$125.00 contributor and the interest in breaching the political privacy of the \$125,000.00 contributor.

That is how I would draw the line Mr. Justice Stewart.

Potter Stewart

And one other question now that interrupted you.

You said you be quite satisfied if the -- with what would be left after the Court accepted your position and struck down these disclosure provisions, what would be left vis-a-vis disclosure, nothing, would it not?

Joel M. Gora

Well, it would depend on how the Court choose to approach that remedy.

There is a severability section in the disclosure provision --

Potter Stewart

But would you say you would be quite satisfied with what would be left with respect to the disclosure requirements after we struck down that you tell us we should strike down, that is after we have held that the constitution makes it impermissible.

There were be nothing left with respect to any disclosure requirements, would it not?

Joel M. Gora

You mean in terms of this present statute?

Potter Stewart

Exactly.

Joel M. Gora

Well, that would depend Justice Stewart on the remedy that this Court choose to employ.

Now, in terms of dealing with sweeping and over broad statutes, one remedy, the potent medicine is to invalidate on its face.

I am not sure that necessary here.

Section 454 of the Act has in effect the severability Section, which reads if any provision of this Title or the application thereof to any person or circumstance is held invalid, the rest of the Act stands.

This Court would determine, for example, that the failure to make distinctions between the two major parties and all the others small minors parties in terms of disclosure warranted invalidating the statute.

I assume a ruling of that kind would leave the regular disclosure provisions in effect.

It might be more difficult for the Court to make a separation out in terms of the threshold, so I would grant that, but I think that the statute itself obviously contains vaine for separating out major and minor parties.

Thurgood Marshall

Mr. Gora, how long have we had disclosure and political contributions in this country?

Joel M. Gora

Technically, Justice Marshall since 1910, practically since April 7th 1972.

Thurgood Marshall

What you say, they have been there all that time?

Joel M. Gora

Pardon me?

Thurgood Marshall

It has been there all the time?

Joel M. Gora

Just has not been challenged that we are aware of in terms of the kinds of First Amendment Association and political privacy arguments that we are making here.

Byron R. White

How many states have disclosure provisions?

Joel M. Gora

Justice White, the bulk of them do.

The count varies, you get a different figure in each of the briefs on the other side.

Byron R. White

Were the bulk of those be vulnerable in your --?

Joel M. Gora

I think not necessarily.

I think there are two differences.

We argue the minor party point and the threshold point.

Now, it seems to me that at the state level, the level of spending for any comparable race, a state senate seat, a state assembly seat, the governor's seat is probably on the whole much lower than the level of spending in any comparable Congressional or Presidential race.

I doubt that there are very many State Representative races that spend 70 or 80 or hundred thousand dollars, so that --

Byron R. White

(Inaudible) constitutionally the state case will come out differently than the (Voice Overlap)

Joel M. Gora

Yes, I am suggesting that it might be shown, that since the average that is spent, let us say in a house race in a state, in assembly race is \$20,000.00 that this Court might find that threshold disclosure there might have to be lower than it is in the case where the spending limits in a Congressional race is \$100,000.00.

Byron R. White

We would should pick out some figures and some threshold figures or --

Joel M. Gora

No, I am not suggesting at all.

I am trying to respond to your concern about the effect of the decision that we seek on state law and I am suggesting that in terms of thresholds, the difference between Federal Elections and State Elections is such that it would not necessarily be controlling and I would say the same thing about the problem of minority parties.

William H. Rehnquist

Before you leave that point, if we say \$100.00 is too low a threshold, we would surely have to articulate some basis for our reasoning as to why \$100.00 is too low, but some other figure would be acceptable?

Joel M. Gora

Well, I think the basis is to look for the purpose of disclosure.

The primary purpose that has been advanced for it is the preventing of corruption and improper influence on Governmental officials.

I think this Court could in a constitutional way require that the disclosure provisions be geared to the level at which improper influence can be brought to bear by virtue of a contribution.

William J. Brennan, Jr.

But how do we know that?

Joel M. Gora

Well, I think Justice Brennan, I do not think it is this Court obligation to pinpoint that I think it is --

William J. Brennan, Jr.

Are you suggesting we should pick out \$1,000.00 or 500 --

Joel M. Gora

No.

I think that this Court should require the Congress to look at these problems and to draw some lines.

I have looked at a good chunk of the alleged --

William J. Brennan, Jr.

I must say if the fact so then the answer Mr. Justice Stewart's questions is that there is anything left and we have to strike it down facially --

Joel M. Gora

There, I think there is a difference between the minority party point, but there lines in the other Section of this Act, regrettably lines which discriminating against minority party and the threshold problem which is a little harder to make distinctions on, but I would suggest that the problem is that Congress seemed to me, to my study of the legislative history to be essentially indifferent to these problems.

And I think what we would request of this Court is that Congress be required to think about these things, to think about whether you really want to require the public identification of the \$125,000.00 contributor to the small party or even to the Presidential Party.

William H. Rehnquist

Should we include that in our opinion that the Congress ought to think more carefully about this?

Joel M. Gora

Well, one would certainly hope so, but I think that as I said there are basis in the statute Justice Rehnquist for validating the application to smaller and minor parties.

The threshold problem presents a different one --

Warren E. Burger

I take your argument Mr. Gora, to be that there is no valid rational public interest in flushing out in publicizing the names of \$100.00 contributors or \$101.00 contributors, none that can be justified constitutionally, but that there is indeed a real public interest in knowing about \$10,000.00 or a \$100,000.00 or \$500,000.00, is that true?

Joel M. Gora

Yes, that is our essential submission that in --

Warren E. Burger

You cannot pick the point where the line should be drawn?

Joel M. Gora

Well, again the point I think has to be attempted to be drawn in reference to the purpose of having disclosure.

If the purpose is not just promiscuous to find out whether your neighbor gives 125 bucks to the local congressional candidate, there is a presumption that is one's politics are one's own business.

That is why when the purpose is in terms of the prevention of corruption then this Court and the Congress must ask whether the disclosure levels are drawn to meet that purpose, that is what we are saying.

Warren E. Burger

We must mean in there that the public interest in knowing about the large one is that \$10,000.00 or \$100,000.00 or \$500,000.00 might conceivably buy something improperly, but that \$100.00 or \$125.00 could not conceivably buy anything --

Joel M. Gora

Precisely our point.

Warren E. Burger

-- these days?

Joel M. Gora

Yes, Mr. Chief Justice, that is our point --

Warren E. Burger

It does not buy much radio time; it does not buy much newspaper space and certainly not much influence?

Joel M. Gora

That is the argument.

Thurgood Marshall

And when you get to figure, will it go up each year, go up with the cost of living?

Joel M. Gora

Well, I think it certainly might.

I mean, they are cost of living adjustments in the statute, but again, I think that the major point we are trying to make is that this Court has to require the Congress to think about these problems, to think about these line drawn problems, both in terms of the threshold of reporting, the \$10.00 record keeping and the \$100.00 from the reporting end in terms of the application to minor parties.

Finally, let me just turn for a moment to Section 434 (e).

As I indicated in response to questions, that Section requires that any private citizen has nothing to do with the Candidate, Political Committees, not making contribution to a candidate or political committee wants to get involved in political activity, wants to condemn his local congressman and run off some leaflets and spend more than \$100.00 doing it, that person has to register with the Federal Election Commission and supply the reports required of political committees.

We think that provision is virtually impossible to justify.

It seems to us that it is flatly in contravention of the principles in the Talley case where this Court protected the right of political speech and unanimity and we think it is also in conflict with the principles of the Thomas case where this Court rejected the application of just a mere registration requirement upon giving a speech.

Section 434 (e) runs afoul of both of those decisions.

And let me finally if I might, in terms of the discrimination against small and minor parties that this disclosure statute involves, it has been our contention that Congress simply failed to consider what alternatives were available to deal with the valid interest served by disclosure.

The same Act which did draw a sharp and unconstitutional distinctions when it came to dispersing the benefit of public financing, for example, to know such distinctions in imposing the burdens on association entailed in reporting and disclosure.

Instead, Congress indiscriminately cast a net across the entire range of political association, that is manifest by contributions to a party without regard to the very widely varying interest at stake.

Analytically this Court found such an approach insufficient in Robell and the other communist membership cases and we would submit that it should find that approach insufficient here.

Potter Stewart

Mr. Gora, I guess I missed something and perhaps I did.

I think neither you nor Mr. Winter specifically separated and identified Section 608 (e) for special attention, did you?

Joel M. Gora

No, we have not.

Section 608 (e) is a flat ceiling on the speech of persons completely unconnected to any political candidate or committee.

In a statute with a lot of unconstitutionality, we submit that that stands out.

William H. Rehnquist

Well, I should think if there is a problem in requiring someone who spends \$100.00 to disclose it, there would be even more of a problem in flatly prohibiting a person from spending over \$1,000.00?

Joel M. Gora

That is our submission, Mr. Justice Rehnquist.

Thank you Mr. Chief Justice.

Warren E. Burger

Very well, Mr. Gora.

Mr. Friedman.

Daniel M. Friedman

Mr. Chief Justice and may it please the Court.

As has been indicated, I will begin by outlining the problems that Congress was dealing within this statute and then rather briefly showing how the particular solution selected accomplished those objectives and then I will discuss in some detail, the reporting in disclosure provisions.

Mr. Cox will then follow and discuss the contribution and expenditures limitations.

Since early in this century, there has been, in the language of this Court in the *Autoworkers* case, a long series of congressional efforts calculated to avoid the deleterious influences on Federal Elections, resulting from use of money by those who exercise control over large aggregations of capital.

Congress first faced this problem back in 1907 by enacting a statute prohibiting certain contributions by corporations in connection with elections.

In the *Autoworkers* case, this Court traced it at some length.

The history of the congressional regulation of this problem what it described as series of acts to protect the political process from what Congress deemed to be the corroding effect of money, employed in elections by aggregated power.

Unfortunately however, as these statutes were enacted, they proved to have so many loopholes that they were virtually ineffective in doing anything about the problem.

And beginning in 1960's, in the late 1960's, Congress held a series of detailed hearings, exploring all aspects of the problem.

These culminated in a 1971 Act, the initial Federal Elections Campaign Act and was followed by the present amendment in 1954.

Now, this statute therefore, is not something that came out of the blue.

It represents the result of many, many years of study, three quarters of a century by the Congress, the body that is particularly expert in knowing the problems, resulting from the use of money, the corrupting effect of money on Federal Elections and Congress has studied the problem, has recognized that when things do not work, changes are necessary and Congress has been willing to change in this area and to try the devise a scheme that will once and for all, we hope put an end to this problem.

The present statute of course is a direct out growth of the disclosures of the 1972 campaign.

There is no need to go into any detail with that sorry and sordid story.

It is set out in the record.

It is a matter of public knowledge.

The huge campaign contributions, the gifts for people who wanted to be ambassadors, the campaign, specific large contributions in connection with anticipated favorable Government actions such as the milk producers, a large number of corporate officials who were convicted and many whom pleaded guilty to illegal campaign contributions and the evidence that developed of the vast increase in the cost of campaigns in this Country.

Warren E. Burger

Three quarters of the century of study of this problem by the Congress, you suggested that was sustained study or sporadic study?

Daniel M. Friedman

I would say Mr. Chief Justice, it was sporadic in the sense that Congress was not constantly looking at the problem, but over a number of times, there are a large numbers of statutes over the years in 1900, starting in 1907 and 1910, in the middle of the second decade, the Corrupt Practices Act of 1925.

Gradually over the years, Congress realized that what it had done up to then was not enough to solve the problem and looked at the situation and devised what appeared to be more and more comprehensive regulatory things.

It expanded the type of controls that extended during war, the prohibition on gifts from corporations to unions, as problems developed Congress studied them.

But my point is that over a long period of time, Congress has considered these problems, studied them and devised schemes to deal with what it perceived to be an increasingly serious evil in the body politic, the corruption of Federal Elections by the use of money and the cost of these campaigns has risen at the staggering rate.

It is really the staggering rate and at page 35 of Mr. Cox's brief, there is a chart which shows the increase in campaign cost reflected to show increases in a consumer price index.

And what it shows is over a 20-year period, from 1952, the 1972, after adjustments to reflect increases in the cost of living, the cost of congressional races increased more than 300% and over the 10-year period, 1962 to 1972, the cost of Presidential races with the similar adjustment increased more than 450%.

And by 1972, it was estimated that the total cost of elections in this Country exceeded approximately \$400 million.

Now, what is the consequence of this escalating cost?

It is a vicious circle because when one candidate sees another candidate spending more and more, he feels impelled to spend more and more.

As the cost of these campaigns increase, the candidates naturally turn to where the money is, the easiest source of money, those are the wealthy interests.

Once a wealthy interest gives a campaign contribution, his competitors, other businessmen also feel obliged to give because they are concerned that if they do not give, either they will be discriminated against by Government officials or their competitors will gain an advantage as result for these contributions.

And thus, the candidates as result of this thing feel more and more obligated to the sources, the large sources of campaign contribution.

And it is not surprising with this history, that by the early 1970's, there was a tremendous feeling in this country that you could not trust the Government, a lack of electric confidence in our Government Officials, the notion that somehow people could be bought.

If you gave enough money, people could be bought and conversely correspondingly really, the average man who was not very affluent, who did have access to all these sources, he believed that it was rather feel for him to try to play an active role in the campaign.

For one thing if you want to run through office, he knew he could not raise these sources money and secondly if he wanted to try --

Potter Stewart

(Voice Overlap) It is not you painted with a very simple brush, it a much, it is considerably more subtle than though you describe it to us, is it not?

Daniel M. Friedman

Well, I think --

Potter Stewart

People often make contributions to a candidate who expresses the donors views.

They do not go out and buy them, do they?

Daniel M. Friedman

Well --

Potter Stewart

It is not as simple at least, through a little more subtle than you describe, you would conceived that, would you not?

Daniel M. Friedman

It may not be quite as simple Mr. Justice, but I do think it is a very serious problem.

As a good example, I think of this is evidence in the record that in many campaigns in recent years the same interests have contributed to two candidates who running against each other.

Potter Stewart

Yes.

Daniel M. Friedman

And that hardly suggests that they have a strong commitment to one candidate.

Those people are obviously hopeful --

Potter Stewart

But if it is the same amount of money, it is the same as though that donor made no contribution at all, is it not?

Daniel M. Friedman

Well, perhaps and perhaps not, but with this exception Mr. Justice that both of these people, whoever is the victorious is likely to feel the sense of obligation to the person who gave him this contribution.

That this --

William J. Brennan, Jr.

(Inaudible) it does not care about the contribution (Inaudible)

Daniel M. Friedman

I am sorry?

William J. Brennan, Jr.

And that the victor hopes that the donor does not care about or the other donor hopes that the victorious candidate does care about the donors' contribution, is elusive?

Daniel M. Friedman

I would assume so.

I suspect perhaps some people in the Congress are aware of this and I think this is one of the things that influenced them to require both limits on contributions and disclosure.

Warren E. Burger

Let us analyze that a little bit?

You made this a very broad general statement.

Would you see any corrupt or improper motive if a very wealthy man said that he would put up a half million dollars or a million, whatever it takes for a series of three national television debates between two candidates or within a state if it is senatorial race.

Now, he is contributing to both sides, is he not, when he finances that?

Anything improper in that?

Could that be explained by a dedication to the First Amendment idea that the issues should be debated?

Daniel M. Friedman

Surely Mr. Chief Justice, but that I do not think was the problem that concerned Congress in this legislation.

Harry A. Blackmun

But the limits would apply?

Daniel M. Friedman

The limits would apply, if it -- well, it would depend whether this -- they may not apply because that would not be, I do not think a contribution directed to the influencing the election or nomination of the particular candidate.

I do not think that it will be anything in the statute prohibiting that kind of a sponsorship of a public forum.

Warren E. Burger

In another occasion and the situation you hypothesized with Mr. Justice Stewart, a man giving \$10,000.00 to each of the two major party candidates perhaps just wants to make sure that one of two men that he regards as responsible will be elected and the third party candidate will not be elected.

Those are all valid motivations, are they not?

Daniel M. Friedman

Those would be valid motivations, Mr. Chief Justice, but I think that has to be weighed against the judgment of Congress that overall, overall the evils resulting from the substantial increase in campaign spending and the giving of large contributions, that these evils are as such as to require some regulation to try to stop this increasing spiral of campaign cost and try to restore public confidence.

I think it is important element that the lack of public confidence, if the public believes, if the public believes that large contributions have a corrupting effect upon electoral process and upon Government and the record here contains a lot of evidence to that effect.

That is a valid consideration for Congress to take into account.

Warren E. Burger

I took the argument of your friends to mean that, yes, indeed there is a public interest in limiting expenditures, but that when balanced against the First Amendment rights of the small contributor, the First Amendment rights shall prevail over \$100.00 limit.

What do you have to say about that?

Daniel M. Friedman

Well, let me if I may -- that is a \$100.00 disclosure limit, that is the small contributes a thousand dollars.

Our answer to that is the disclosure --

Warren E. Burger

That is the limit of it, the limit that you can give out having his name flushed out?

Daniel M. Friedman

Yes, but he can give up to a thousand, he can give up to a thousand, but more than -- if he gives more than a hundred, that has to be disclosed.

Our answer to that is disclosure serves two important objectives.

One, which I think our opponents have recognized, is that it does serve an informing function.

It tells the electoral whose backing whom.

It shows who their friends are and this is an important element because in making the choice, when the electorate makes the choice it should know who is behind whom in these cases.

Indeed, I dispose a rather simple hypothetical.

Suppose you have a keen congressional race in which both candidates are urging that they are dedicated to improving in cleaning up the environment and this is keenly contested thing, each one accuses the other of not being sympathetic to the environment.

I think it would be highly significant to the voters in this district, if they knew that a large number officials of several of the firms in this district that were accused of being the leading polluters had all contributed to one of the candidates, that would be very significant.

Now, let me add one other thing on the \$100.00 amount which --

Lewis F. Powell, Jr.

Are you going to leave the hypothetical that you just put?

If you are, I beg to leave it.

I would like to ask this question.

As I understand it that cooperation and unions are exempted from the spending and contribution requirements of this Act?

Daniel M. Friedman

To the extent that Section 610 permits it.

That is, they have to have a separate independent fund from which contributions are made.

All of these activities --

Lewis F. Powell, Jr.

Is there is any limitation on that fund?

Daniel M. Friedman

I do not think so.

Once it gets into the separate fund, but they --

Lewis F. Powell, Jr.

That is right, the union and the cooperation as the case maybe has the authority on the 610 to organize that fund and they solicit the money for the fund from stockholders, employees and union members.

Now, you are talking about the corrosive or corroding effect of large concentrations of wealth.

How do you explain the exception of cooperations and unions from this Act?

I think the brief filed by your colleague, the Attorney General stated in a footnote on page 31 that in the 1974 congressional elections, unions spent \$4.3 million, corporations \$1.6 million, medical association \$1.5 million and so on?

What about those concentration of corroding wealth?

Daniel M. Friedman

I am not sure Mr. Justice that all of those contributions would be permitted because under this Court's decision in the Pipefitters case, the fund, the independent fund cannot be under the control of the either the corporation or the union.

It is has to be an independent fund and I do not know how many of those contributions that you refer to, would in fact be permitted under the statute.

My other answer is that perhaps, perhaps at some point Congress will feel it necessary to close and cut down on the corporate and union contributions that are now permitted under 610, but that it seems to me is another matter.

The fact that it is permitted under that particular provision, I do not think is a reason for saying that Congress cannot act under this statute as it has.

Potter Stewart

I understood Mr. Friedman maybe mistakenly that there was a difference of opinion in the briefs as to whether the limitations of the present statute would extend to the kind of committees permitted under our Pipefitters construction of Section 610.

The question being whether or not they would be so called "committees" under the statute?

Daniel M. Friedman

There are problems --

Potter Stewart

Is their difference?

Is there --

Daniel M. Friedman

I think there is a problem --

Potter Stewart

And to the applicability of the existing statute to the kind of organizations that my brother Powell was referring to?

Daniel M. Friedman

I think so and that is an issue that initially, I suppose the Federal Election Commission will have the resolve.

William J. Brennan, Jr.

(Inaudible) that any limitation say on contributions to a particular candidate, out of the segregated union or corporate funds apply to those funds, does it, Pipefitters is the 610?

Daniel M. Friedman

610.

William J. Brennan, Jr.

Yes, I remember.

Daniel M. Friedman

No, but we have to kind of pause this two together and see how you fit them together.

Congress did not intend.

I do not --

William J. Brennan, Jr.

I do not see anything in 610 itself would subject contributions on those segregated funds to the limitation?

Daniel M. Friedman

Not in terms, but it maybe --

Potter Stewart

Of course, would there be committees on the existing limitation --

Daniel M. Friedman

Yes, but in terms 610 which is an old statute, was not enacted with this in mind, but there will be problems of the extent to which the limitations of this statute would apply to those --

William J. Brennan, Jr.

Do you suggest in the first instance the Commission would have to determine that?

Daniel M. Friedman

I would think it would because a problem may come up whether a particular fund of a cooperation or union can make a sizable contribution.

Under the statute normally, this would be put to the Commission and the Commission could give an advisory opinion on it.

But let me if I may --

William H. Rehnquist

Mr. Friedman before you go on, if your answer to Justice Powell is right, it is certainly stands the cases of this Court on the subject down their head because the thought had been that you could do to -- you could prohibit contributions from corporations and labor unions in a way that you could not prohibit them from individuals and now if you are right, Congress comes a long and says we are prohibiting individual contributions, but corporations and labor unions are free to give what they want to?

Daniel M. Friedman

Well, I do not say they are free to give what they want to it.

The question is whether or not these special funds have been locked in, if I may use the phrase or subjected to the limitations of the statute.

Now, there is a provision saying that political committees may give up \$5,000.00.

That applies not only to -- if these funds are political committee -- I am not suggesting Mr. Justice that Congress is barred in anyway from imposing the limits upon cooperations.

The only question is whether Congress in this statute, whether Congress in this statute has not tied the knot and closed the ends as effectively as it perhaps it might have.

I do not think that Congress can be faulted because in dealing with what it perceived as the general problem of large corporations, it did not specifically say a no union fund or no cooperation fund may exceed these limitations.

I think Congress left it somewhat unclear because of the question whether these funds would be committees --

William H. Rehnquist

Yes, but the history of our cases has been first to sustain corporate limitations with the thought that you probably would have a great deal more difficulty with individuals and then to say, well, you can treat unions the same what you do corporations, still intimating that you would have a great deal more difficulty with individuals.

And now you say, Congress has come along and stood the things on it his head that individuals are limited, but corporations and union are not?

Daniel M. Friedman

No, I am sorry Mr. Justice.

Perhaps I misspoke myself and did not make myself clear.

This provisions apply not only to individuals, but to unions into corporations.

Congress has not said that corporations and unions are to be treated differently from individuals with --

William H. Rehnquist

But the segregated funds are to be treated differently?

Daniel M. Friedman

Perhaps, segregated funds, but then again all that Congress, all that has happened in this situation is Congress has not gone as far as it might gone in this statute.

William J. Brennan, Jr.

But you suggested to me earlier namely whether or not these segregated funds are to be treated as political committees as a question in the first instance to be decided by the Commission.

So, I take it we do not reach that question in this case for the purpose of deciding?

Daniel M. Friedman

I would think not Mr. Justice because there has been as far as I know no ruling on that, thus far.

William J. Brennan, Jr.

Well, I think you suggested that there could not be until after the Commission had in the first instance decided whether or not --

Daniel M. Friedman

That is difficult question of exhaustion of remedies that I would be rotten to take a position on, but I think the normal practice, the way the Commission functions is if they were a question, a request would be made to the agency for an advisory opinion.

If I may come back to the disclosure --

Lewis F. Powell, Jr.

Mr. Friedman, I do not want to deter you from proceeding, but I would like to invite your attention to a statement in the brief filed by the Attorney General as amicus.

On Page 74, the brief says, flatly that corporations and unions can accept and spend the funds without limit, supporting or advocating the defeat of candidates.

Now, of course the brief could be wrong as I think you suggest, but I wanted to call that to your attention, at page 74 --

Potter Stewart

A footnote in another brief, that I cannot locate at the moment, takes issue with --

Lewis F. Powell, Jr.

Takes issue with that?

Daniel M. Friedman

I think there is some quite, I would have to say some doubt that because O do not -- let me say this, if I may Mr. Justice.

I do not think nearly as clear as the statement in amicus brief suggests that corporations and unions as a practical matter may make unlimited contributions in the course of campaigns through the use of these funds.

If I may returned again --

Warren E. Burger

The experts on this these subject, I suppose some people will have to act at their peril in deciding what to do without being sure whether they will or not go to the jail?

Daniel M. Friedman

No, Mr. Chief Justice, they will not because under the statute and the statute explicitly provides that anyone who is a candidate for office can ask for an advisory opinion from the Federal Election Commission which the Commission is required to answer and if he gets that opinion, it is presumed that if he acts in reliance on this opinion, he has acted in accordance with law.

So, people are not left wholly at large to worry about it.

They can get an advisory ruling and the Commission has already given 20 to 30 advisory rulings on these topics.

So, there is not in this case the danger of somebody going to jail without being able to get some advice.

They can get advice from the expert agency.

Warren E. Burger

But if he does not ask for the opinion and simply gets the opinion of his own lawyer one way and that turns off to be wrong, he has got problems I suppose?

Daniel M. Friedman

I would suppose in much the same way that anyone who is subject to a regulatory statute has problems about whether or not he has violated the statute.

But, again that is not a problem it seems to me that is faced in this case because the time to really decide that question I would suppose is if and when someone is charged with having violated the statute by making that kind of a contribution.

Thurgood Marshall

Can you please may back up a minute on your disclosure point, the \$100.00 point?

You are talking about two parties, what about the third and unhappy and unlighted and crusade party?

Daniel M. Friedman

They too can play a role in a election.

They can play a role --

Thurgood Marshall

If the board is disclosing those names and this Court said, that they do not have to?

Daniel M. Friedman

No, Mr. Justice I --

Thurgood Marshall

That is what they say?

Daniel M. Friedman

I think that the cases in which this Court has struck down disclosure requirements are cases in which one of two things have happened.

Either this been a clear evidence that disclosure will produce harassment or chills such as in some of the NAACP cases.

In NAACP, we have a battle where they put in uncontroverted evidence with respect to the adverse effects that resulted from this --

(Inaudible)

Daniel M. Friedman

Well, again there were not.

Let me come to the other aspect of the equation, all cases in which there was no showing of any substantial compelling state interest.

Now, the record in this case is the Court of Appeals said was slam with respect to the possible harassment of disclosure.

There were three minor instances in which there was a slight suggestion and our position to that five representatives of minority parties indicated that as far as they could tell, there was no

indication either the people would refused to contribute, if they were disclosed or that anyone whose disclosure had been made public, his contribution had been disclosed, was in fact subject to any harassment.

These minority parties play an important role.

They can affect the influence of an election by drawing votes away from one to the other.

At page 179, in footnote 210 of this blue brief filed by the Center for Public Financing of Elections and Others, they give three indications, three examples of the so called Stalking Horse Phenomenon in which a political party sponsors a minority candidate in the hope of drawing votes away from the opponent.

That is in --

Potter Stewart

That Mr. Friedman is in that brief that I have now located the footnote to which I earlier referred, it is footnote 124 on page 107 and the accompanying text, that takes issue with the government' amicus brief on pages 36 and 37 in the accompanying footnotes.

Daniel M. Friedman

Thank you.

One other thing about these disclosure provisions which think is very important to remember.

On its face one might say, "Well, who cares about a \$100.00 contribution."

A \$100.00 contribution is not going to corrupt anyone and why set the limit this low?

The answer I think is two-fold.

First, this is a very useful method for enforcing the statute because and particularly where the overall limit is \$1,000.00, a contribution of a hundred cannot said to be in substantial, but equally or perhaps more important is the problem of culminating of combining contributions.

If you have a large number of people who are a affiliated, who do combine contributions again in this blue brief on page 174, an example is cited how a Senator on one day, in his senatorial campaign received 247 individual contributions totaling \$28,000.00 from the employees of one single corporation.

Now, that it seems to me is the kind of information that is very useful to the electors.

They like to know if a large group of affiliated people have a sufficient community of interest that they all favor a candidate, that is again the same kind of thing as the general disclosure of who is backing the candidate.

That is the sort information that people would like to have.

This --

William J. Brennan, Jr.

Mr. Friedman could that corporation have set-up a segregated fund and solicited or set-up a desk in the front office and said anyone who wants to contribute, contribute it and 247 came along, made contributions totaling \$28,025.00 and then under the Attorney General's suggestion I gather that could have been spend by that fund anyway they want it without any disclosures of the names of those 247?

Daniel M. Friedman

If in fact, if the amicus brief is correct that this is not a political committee, but, again Mr. Justice I think the answer is that perhaps if it should turnout that this device of the contributions by independent funds is another technique that has been used to evade these statutory provisions as we have these mobile committees in the past, Congress may at some future date see fit once again to amend the Federal Election Campaign laws to close that loophole if it is prove to be loophole.

But our point is that the presence statute is a reasonable effort made by Congress to deal with this problem and that why we think there is a very little, if any, chilling effect to whatever extent there maybe some slide show we think that is more than off set by the very strong compelling Governmental interest in trying to protect the integrity of Federal Elections.

A compelling interest which we think under the decisions of this Court justifies any possibly slight showing effect that these provisions may have upon the exercise of that most fundamental of all our rights, the right to vote.

(Inaudible)

Daniel M. Friedman

I do not believe so Mr. Justice.

I think the theory is that and the record indicates that large contributions have been made on both sides of the allied.

I think Congress was not concerned that the large contributions will favor in one side of the other.

Congress was concerned that the large contributions were having a corrupting effect on the electoral process.

(Inaudible)

Daniel M. Friedman

Well, Mr. Justice I would say that this is -- to us this is not speech.

This is money.

Money obviously called as important connection with speech, but it seems to me what Congress was concerned here was not with attempting to in anyway limit total speech limit conduct.

Congress was concerned here with the effect, the effect that these large contributions no matter what the political persuasion of the recipient, with the effect these large contributions would have upon the whole process.

And I think Congress as this Court's decisions have made clear, going way back to Burroughs and Cannon (ph) in 1934, Congress has the power to deal with the corruption that results from this infusion of money.

And I do not think that. Congress was attempting to say that, well, there is too much speech here and what we going to do is cut down the amount of speech.

Congress was saying there too much money being spent and the money has bad effects and we are going to try to cut down the amount of money.

Now, to some extent to be sure, to some extent cutting down the money is going to cut down on the volume necessarily of speech, but it seems to me this is an incidental effect.

The main trust --

William J. Brennan, Jr.

Well, you are suggesting that the issue it is not a personal remedy?

Daniel M. Friedman

No, of course not Mr. Justice.

I am suggesting, I am suggesting that in this area when we doing with this kind of a restriction, when we are dealing with this kind of a restriction that the compelling interest --

William J. Brennan, Jr.

That is what I thought you said --

Daniel M. Friedman

Yes.

William J. Brennan, Jr.

That the first Amendment problem, that any First Amendment rights are overridden by compelling the governmental interest --

Daniel M. Friedman

Or if I may --

William J. Brennan, Jr.

That is your basic argument?

Daniel M. Friedman

That is our basic.

If I may we rephrase it slightly, any adverse impact upon first amendment rights is overridden by the compelling Government interest.

Potter Stewart

(Inaudible) in speech and speeches money whether to be buying television or radio time or newspaper advertising or even buying pencils and papers and microphones, that is certainly clear, is it not?

Daniel M. Friedman

Money affects speech, but I would not agree that money is the same thing as speech because not every contribution that is made to a political candidate is used for speech.

They maybe used for many things --

Potter Stewart

But insofar as it used to buy people to vote, that is covered by other criminal statutes, so were obviously not talking about the that --

Daniel M. Friedman

Well, Mr. Justice if it is rather difficult to (Voice Overlap) --

Potter Stewart

And that is tried by other and older criminals' statutes --

Daniel M. Friedman

Specific bribery, yes.

Potter Stewart

Or purchasing of votes given --

Daniel M. Friedman

Purchasing a vote in the crude sense, if it is bribery.

But there are other subtle influences that work which may not come to the purchase of a vote, but which may nevertheless have the same effect.

Potter Stewart

And the question is whether those so called subtle influences are influences protected by the constitution of the United States, specifically Amendment one there a --

Daniel M. Friedman

We do not question that there is a First Amendment protection to these interests.

As we see the issue it is whether whatever adverse impact the statute has on the exercise of those rights is outweighed by what we deem to be the clearly compelling Government interest underlying the legislation.

Potter Stewart

Again, just phrase down Mr. Friedman.

You did not precisely separately discuss Section 608 (e), did you?

Daniel M. Friedman

No, I did not.

Mr. Cox will I think be discussing that.

William H. Rehnquist

For a reason just before you were questioned by my brother Stewart and Brennan, you said that you thought the chilling effect here was justified by the interest in the most fundamental of all our rights, the right to vote.

Is it your position that the United States constitution places the right to vote in a position superior to the right to speak or publish?

Daniel M. Friedman

No, I do not -- but of course not Mr. Justice.

What I was suggesting is that this Court in a number of its decisions has recognized the key role that elections play in our democracy and I was suggesting that what Congress was doing in this statute was attempting to protect the integrity of that right to protect the integrity of the whole electoral process.

Harry A. Blackmun

I think we have some more time.

Following to what Justice Stewart indicated, it seems to me in a distinct sense that one of your problems is to joist with this suggestion that money is speech and I think part of the argument of your opponents is very forceful in that respect.

It does produce speech.

Now; all of us of course recognize that there is a profound and disturbing problem that has existed.

I suppose the question is what are we going to do about it and does the statute do it effectively without unduly violating the First Amendment?

Daniel M. Friedman

We think the statute does at least we think Congress is attempting to do -- I would suggest Mr. Justice that when you are dealing with restraints upon First Amendment rights, you have spectrum.

You have the immediate prohibition that someone cannot speak, cannot publish then you begin to shift over and it seems to me as the impact upon First Amendment rights becomes less direct and more incidental, you can give greater weight I would think to the compelling interest of the state in imposing those limitations.

Harry A. Blackmun

Well, I just want to emphasize that I think it is unnecessary really for your side of the case to impress upon this Court that there is a problem.

I think we are aware of this one?

Daniel M. Friedman

I am sure you are and I hope you would resolve it the way Congress has resolved it.

Warren E. Burger

Mr. Cox.

Archibald Cox

Mr. Chief Justice and may it please the Court.

So I come late in the argument.

I cannot resist saying just a word in recognition of the importance and weight of the responsibility that rests upon this Court in this case.

Judging the constitutionality of the statute even when there are few are issues, less complicated issues and there are here, is always a solemn occasion, but here the issues are of even greater magnitude, indeed of a magnitude greater than any of those in any Federal Legislation I can think of in several decades, except perhaps the Civil Rights Acts of the 1960's and certainly none go any closer to the heart of our Political and Governmental system.

The attack I would emphasize, is leveled not only at the conclusions of the Congress and the President of the United States, but in substance it is leveled at the conclusions of a majority of the state legislatures and we must take it that much of this represents the conclusions of their people.

There are 44 States that have disclosure statutes in one form or another.

There are 37 States that put limits on expenditures, many of them going back a number of decades and there 10 States that have been adopted public financing.

So, that in addition to the weight of the judgment of the Congress and the President to sign the legislation, there is this added problem of the state legislature.

Now of course if it is the court's responsibility the whole the Act unconstitutional, it will do it as this Court always has, but I submit that those are considerations that should be weighed in the balance.

My argument is directed to the proposition that ceilings upon contributions and expenditures are consistent with the First and Fifth Amendments both as a back did on the face of the statute and as applied to any situation ripe for adjudication.

It is important at the outset to be clear about exactly what the ceilings on contributions and expenditures do and do not do.

The Act deals with conduct, the giving and spending of money.

The conduct is speech related, I acknowledge and indeed emphasize because money buys the facilities of best communications and leveraging the money available for political campaigns, available for spending may of course to some degree reduce the amount that is spent for mass communication.

But even so the conduct to speech related, I emphasize that it is conduct and not speech.

The FECA does not prohibit, punish or attached liability to utterance, communication or publication except in the very limited sense that in the case of expenditures one may have to look at the publication to see whether it urges the election or defeat of candidates.

So, it will be evidence as to purpose, but in no other sense --

Potter Stewart

That would be only under --

Archibald Cox

608 (e).

Potter Stewart

-- 608 (e), would it not?

Archibald Cox

That is correct, Mr. Justice.

But there is no attempt under 608 (e) or anywhere else to censure directly or indirectly the ideas expressed or the verbal or pictorial form communication.

Equally apart, the public injuries at which the Act is directed are the consequences, not of speech, but of conduct.

Congress was not saying that there is too much speech.

The dangerous thoughts were being expressed, that the wrong people were expressing or that they were expressing them in dangerous ways.

Congress was concerned with what we call the arms race political expenditures.

With the pressure to raise vast financial resources, the corrosive influence of obligations to big contributors upon the conduct of Government, with the laws of public confidence in the honor and integrity of Government when money spent plays too big a role.

And with the political inequalities resulting not from the volume of speech, but from the need to raise money and the indebtedness to those who provide big money and I think those two characteristics of the statute fix the applicable First Amendment principles, although I do not suggest for a moment that they render the First Amendment irrelevant.

When the Governments attempts to deal with speech directly then a case for regulations has to be made wholly or in partly at least in terms of the danger, the danger of the consequences of the ideas.

Mills in Alabama's are very good example.

The Alabama statute forbade last minute newspaper editorials on Election Day.

The only conceivable justification was that the ideas expressed would have somehow have too much impact upon the public and it was quite right for the court to reply as it did in that case, no test of reasonableness can save such as state law.

The reason is that censorship concerned for the ideas expressed may suppress the information or criticism essential to Self Government.

It carries danger of discrimination among ideas or speakers and there is sometimes have been said, it carries the seeds of an official ideology.

And, of course in such cases there is little or perhaps no room for balancing because the very purpose of the First Amendment as James Madison said "Is to withhold the censorial power from Government and retain it in the people."

The cases that illustrate this proposition are the case of the Pentagon Papers, New York Times against Sullivan, Miami Herald against Tornillo and the Red Lion Broadcasting case.

I want to make clear -- plain that we are not quarreling with those cases and we have no need to invoke any of them in our support.

Cases like the present which involves the regulation of speech related conduct because of the public injury done by the conduct, quite apart from the speech call for an entirely difference step.

Such a law carries few with any of peculiar risk of censorship.

It does not suppress criticism, ideas or information.

It rests no discrimination.

It carries no seeds of official ideology.

Balancing in such cases is appropriate and has often been sustained by the Court.

Weinberger and Hayes is an admirable example.

They are the conduct, a duty to testify was of grave public importance just as it has to giving evidence by all of us is grave public importance.

It was argued that regulating the conduct imposing that duty would tend to chill or deter of the flow of information to the public.

Both the opinion of the Court and the principle dissenting opinion as I read them, I agreed that the test was rather the consequential effect upon the flow of speech was justified by the public interest served by imposing the duty to testify.

The Draft Card burning case, United State against the O'Brien is another example.

After observing that the possession of the Draft Card contributed to the effective administration of the selective service laws, the Court observed the case at bar is therefore unlike one where the alleged Governmental interest in regulating conduct rises in some measure because the communication itself thought to be harmful and the Court will recall that it is went on to speak of the need for balancing and to hold that the public purposes, if compelling or paramount were sufficient to justify the purely consequential and in that sense coincidental impact upon speech.

I hold this part so important that I want to take one last example to elaborate.

The appellants and the Solicitor General assert that limiting the money spent to publish a newspaper would violet First Amendment and they are like in this case to the case of the newspaper.

I submit that they both speak too indiscriminately.

A limitation on the publishers' expenditures would violate the First Amendment if it is rested upon some notion that the columns were too long, the editorials were too frequent, the circulation was too wide.

There were too many additions or something of that kind, but consider.

During the war time shortage, Congress certainly could limit the money that could be spent to buy newsprint even though the consequence was to reduce the circulation of the paper or the number of editions.

William H. Rehnquist

What happens Mr. Cox, we have to limit it even handedly, would it not?

Archibald Cox

Oh! Yes, but we say this statute does limit even handedly.

William H. Rehnquist

Well, but it limits the amount of money that can be spent on political contributions or on 608 (e), the amount that can be spent for individual expressions in support of a candidate, but it does not limit any other kind of expenditure?

Archibald Cox

I would have to agree that because the dangers that the statute is directed to operate in the area of political campaigns, the only speech that is consequentially effective is political speech.

I cannot dispute that.

I would simply say that again was not based on a congressional judgment as to something desirable or undesirable about political speech and certainly contained no kind of discrimination between different political ideas or parties or candidates.

Potter Stewart

It does limit only a certain kind of political speech, now, whether not that maybe helpful to you, but I --

Archibald Cox

Yes, I was thinking of kind in terms of ideas Mr. Justice.

You are quite right.

It will bear of course on the least personal forms of speech.

Well, it does not bear on an individual's personal --

Potter Stewart

General, political views if he wants to understand Section 608 (e), he can spend (Voice Overlap)

Archibald Cox

I think we have the same idea.

I may have misspoken myself and I think that does in a very real sense help this up.

But I would say that this kind of discrimination Justice Rehnquist is coincidental or consequential and it is not the sort of selectivity or undesirability that would be enough to make a different test applicable.

Warren E. Burger

Mr. Cox would not the limits that is the disclosure limits, the \$100.00 limit, the \$1,000.00, the expenditure limit could not they be so low or if they were cast so low, do you agree that they might then impinge on First Amendment rights?

Archibald Cox

I would.

I would agree to two things that if they are set so low as really not to allow any use of the mass media that would present a very different case in the one here.

I would agree too that if they were set very, very low they might then discriminate against challengers to incumbents, but on both points I submit Mr. Chief Justice that the record is very clear that that it is not the consequence of the statute.

In terms of the expenditure ceilings it is quite clear and the figures are all in our brief, that the ceilings are very close to those which have governed in political campaigns in the past.

For example in 1972 and 1974 lumping the whole 2000 candidates for the house together, 97% spent less than the ceiling.

There is now suggestion that there was inadequate speech in those 97% of the campaigns.

Even in the case of presidential elections, the figure is very close to the average amount spent by the two candidates in 1968.

It is a little bit above the amount -- a little bit below the amount spent by Senator McGovern in 1972.

It is way below the amount spent by his opponent, but it is higher than we spend in any previous campaign so that we say that it is closely related to what took place in the past.

That one has to conclude that Congress had a solid basis for judging that this would not seriously curtail the volume of political speech.

Potter Stewart

I want to be sure that I understand your answer to the Chief Justice's question.

You said that you would agree or you would believe that if the limits were set lower that there could be a point where they were I permissively low as a constitutional matter, is that your answer?

Archibald Cox

Yes.

Potter Stewart

Now, the limits on what contribution and expenditures be low --

Archibald Cox

I was speaking of overall limits on expenditures.

Potter Stewart

How about disclosure?

Archibald Cox

Disclosure, I did not in my answer have that in mind.

I do not think the limit on disclosure, that there is any reason to suppose that will affect the volume of speech at all, not just like --

Potter Stewart

In other words which would be just as constitutional, would it not, in your submission to require disclosure of a \$1.00 contributor as it would be a million dollar contributor, so far as the constitution goes?

Archibald Cox

Well, the constitutional argument is stronger in a case of requiring the disclosure --

Potter Stewart

Why?

Archibald Cox

Because there is more danger of the million dollar contribution being corrupted and there is more reason for the public to wish to know who is giving a million dollars to a political campaign.

Potter Stewart

That is there is a greater invasion with respect to the --

Archibald Cox

A greater what?

Potter Stewart

Invasion of privacy with respect to the large contributor --

Archibald Cox

No, I think the change in balance, if any, is on the justification, not on the invasion.

So far as this record shows, there is very little -- there is no showing of any deterrent effect that disclosure.

These laws have been on the books for a very long time.

Of course if one could contribute, especially if it is a group of corporate executives that are contributing they rather contribute before the disclosure law becomes effective than after as one of the Justices find it out, that does not show they would not contribute there.

Lewis F. Powell, Jr.

Mr. Cox, I as understood you, you express the view that a challenger is not disadvantaged by this Act.

May I put this hypothetical to you? Suppose the challenger is in a District from which the member of Congress has said say for 10 or 15 years and therefore is very well known.

Assume further that the entire media in that District supports the incumbent.

Would you think he would have much of a chance, I realize that would depend on the facts and circumstances, but (Voice Overlap) disadvantage.

Archibald Cox

I was speaking Justice Powell in terms of the general impact and I will agree that you can think of cases where the only way in which a man could win was by having to spend enormous sums of money himself because everything else was staked against him and I was thinking of the

generality, I got into it by attempting to grab in answer to the Chief Justice's question, that if the overall limit on spending were very, very low than the man who has recognition to begin with, of course, would have an advantage.

The point I was seeking to make was that the ceilings here are not that low and I think that again is shown by experience and of course the burden of showing is not those defending the statute, it is on those attacking.

But if you look at the ceilings, on the basis of the 1974 Election, it seems that they give ample chance to challengers to gain recognition.

And second that taking the Act as a whole, they hurt incumbents who probably have the greater money raising capacity more than challengers.

Let me give just a few things.

I pointed out a moment before that only 3% of all the candidates in house races, it is little less than 3% exceeded the ceilings in 1972, 1974 even after 1972 was adjusted for inflation.

Of the forty successful challengers in 1974, only one exceeded the ceilings.

Of the 28 challenger winners in close races, that is where the winner got less than 55% of the vote, the average spent was only \$95,000.00 out of an overall ceiling of a \$168,000.00 for the combined primary and general election.

Of the candidates in close races in both primary and general election, in 1974, only 459 exceeded the combined ceiling.

So, there really is very little ground for arguing, that these ceiling which really check the sky rocketing increase rather than cut anything very much back, particularly in the congressional races do not allow adequate opportunity to become known and I can find no basis for arguing that on the whole --

Alright.

Archibald Cox

-- they fail, they discriminate against challengers.

I think if they do anything they hurt incumbents more than challenger.

Harry A. Blackmun

Mr. Cox that the legislative history show that the kind of analysis you just given us?

Archibald Cox

Did Congress what?

Harry A. Blackmun

Did Congress make the kind of analysis in fixing these limits that you just been suggesting?

Archibald Cox

I am not able to say that it did, I think one must assume that many members of the staff and others did study these things and I am informed --

Harry A. Blackmun

Well, I just wondered whether the legislative history reveal that kind of analysis?

Archibald Cox

Perhaps I have a moment after lunch in which I could answer your question Justice Blackmun.

Byron R. White

But at least the Congress decided what the amendments are going to be?

Archibald Cox

Oh! Yes, after considerable discussion.

Byron R. White

They apparently thought that this would be enough money for anybody to --

Archibald Cox

And these were men who had run in many, many races, sometimes most recently as winners, but I have no doubt many of them sometimes disclose.

Byron R. White

But the difference that you might give to a congressional judgment in how much money it might be appropriate, it may not be the same if when we are talking about how much incumbents thought can challengers might need.

Archibald Cox

Well, I find it hard to believe that all 435 favor incumbents entirely.

I recognize the point.

I recognize too that this is a First Amendment case and that the judgment perhaps requires somewhat closest scrutiny, but I would think that the Court should simply act as a legislative body, I have -- excuse me.

Byron R. White

Your answer apparently is what you already given that they saw in history, incumbents would not do any better than challengers?

Archibald Cox

That is correct and indeed I think the history shows much either way.

It is shows that the incumbents are hurt more because they nearly always spend more both when there successful and unsuccessful and this we draw from the figures on the close races.

Warren E. Burger

I take it your answer give some weight to the incumbents on a lot of ability and assets that challenger do not have, namely large office staffs and branch offices out in the District that sort of thing?

Archibald Cox

I recognize --

Warren E. Burger

What is news, news worthiness to what they do that the challengers do not always have?

Archibald Cox

There is no question that the incumbents have advantages sometimes the disadvantages, but they are likely through name recognition to be advantages.

My proposition is that this statute does not make challengers any worse off in that respect than they were before.

Now, some have mellifluous voices and others do not.

They are all kinds of injustices in the world.

I say this statute does not make it any worse and we developed that in some length in our brief.

I would add to that Mr. Chief Justice that the most that is contended, is that on the average as I understand it because the word generally is included in the heading in the brief that on the average they contend statistically somewhat more incumbents may benefit and challengers be hurt than the other way around.

But one does not make a case of unconstitutional discrimination by that kind of statistical average.

Furthermore, all it seems to me say is that challengers gain more from the pernicious practices and incumbents and we would say that the pernicious practices are the evils, Congress were meeting or was meeting are such that they justifies certainly any chance differentiation between them.

Warren E. Burger

Well then I suppose you would say that were the whole area is foggy than the land drawing should be left to the Congress?

Archibald Cox

I would certainly say that -- yes Mr. Chief Justice?

Warren E. Burger

We will resume there at 1 o'clock

[break]

Warren E. Burger

Mr. Cox.

Archibald Cox

Mr. Chief Justice and may it please the Court.

Before the recess, I had to confess to Justice Brennan my ignorance on one point, but is now been relieved Mr. Justice.

An analysis of the relationship between possible spending ceilings and past experience based, of course, on 72 rather than 74 because 74 had not happened, it was submitted to the congressional committees chiefly by common cause and it was essentially the same kind of analysis that I made.

If you care for the references, you will find it in the hearings on H-7612, 93rd Congress, First Session which was in October and November 1973, and similarly on hearings on S-1103 at the same Congress and the same session.

At that time, I may say, and then I would like to go on, the common cause representatives were arguing that care must be taken not to set the ceilings too low and the quotations that my friend has referred to, complaining that if the ceiling was too low, it would discriminate against challenges.

It was during a time when much lower ceilings were being discussed than appear in the statute.

Now, I would like, during the moments remaining to me, to address myself to Section 608 (e) of the statute which has been mentioned several times this morning, that is the Section which deals with the so called independent expenditures.

If an expenditure, a spending of money in the loose sense, is requested by a candidate or his committee or is otherwise made with his authority, then it is a contribution and counts against this overall ceilings.

If the spending is done without any kind of authority from the candidate than it falls under Section 608 (e) and if it exceeds \$1,000.00, it would be unlawful.

To put the discussion of that Section in context, may I first recall portions that I will have to leave to my brief, having stated as we did, the applicable constitutional principle this morning, then of course a complete exposition would call first three showings I did seek to show that adequate opportunities were to remain.

Second, that the purposes of this legislation where indeed compelling, the purposes as we see them are first, to protect the honor and integrity of government operations in both the legislative and executive branches against the corrosive influence of large contributions, the pressure to raise large money and the resulting sense of indebtedness which of course does not affect every contribution, but there appear to have been too many of that character.

Its concern with the public's confidence in its government against the appearance of things when government favors, follow such large contributions and its concern with giving the small donor an equal voice with the large donor, not in speaking, but in opportunity to reach that candidate, the large donor money.

Now, we say that Section 608 (e), the limit on independent expenditures is essential to the effectuation of those purposes.

Very briefly, if there were no such provision in the statute, then instead of making a contribution of 5, 10 or \$50,000.00, someone would just spend it, take over all a candidate's advertising in Lawrence, Massachusetts or take over the broadcasting of film clips of his previous speeches or his television spot and surely in this aspect of 608 (e), it is essentially like a contribution, it is money that a person who spends it is putting out.

He is not putting out his own words or his own ideas. He is not engaged in personal activity.

William H. Rehnquist

Well, Mr. Cox, I notice that distinction in your brief too.

How about the Ad that was bought in New York Times against Sullivan.

Well, would that be under your definition of personal activity or that just be money?

Archibald Cox

I think the Ad and of course that is not in support of a candidate, we both understand that --

William H. Rehnquist

No, but I need the Ad.

Archibald Cox

-- would not be affected at all.

It would depend how much the individuals contributed to its composition, quite practically.

William H. Rehnquist

So my act in just signing an Ad that someone else has prepared, does not have the same First Amendment protection as if I (Voice Overlap)

Archibald Cox

Well, I would think, I would suggest that it is under the First Amendment of course.

I do not say anything.

I would it was entitled to less protection than it is when you yourself compose the Ad or make the speech.

I have a lesser role if I used to have a lesser role when I signed the brief as Solicitor General that Mr. Spritzer had written then when I wrote a brief myself and I am suggesting that there is something of a lining.

Now, I am not making anything turn on that except by assertion that in the case where the individual has no personal participation, it is just like a contribution, then I say --

William H. Rehnquist

How about a ticket that is carrying a placard that someone else wrote.

I mean, is he pretty well down to bottom of the First Amendment values?

Archibald Cox

I think these cases shade indistinguishably one into another and I cannot draw an intelligible line.

Indeed, my essential proposition is that an intelligible line cannot be drawn and that the reason Congress included 608 (e) as it did, was that it decided that the most sensible line was between personal participation in campaigning or in speaking, in doing things yourselves in personal services and spending money and it drew the line there because there was no other very satisfactory way of doing it.

William H. Rehnquist

But if they could -- if there is no intelligible line to be drawn then presumably under your analysis, they could equally well have forbidden the expenditure of more than a certain number of hours of personal service?

Archibald Cox

No.

Well, I think where it is truly personal services, that is distinguishable from spending money.

Now --

William H. Rehnquist

You do make something turn on the point then?

Archibald Cox

I make something turn between truly personal services in speaking and putting up money.

I agree that they shade one into the other and that the question is where is the most satisfactory place to draw a line and I suggest that the most satisfactory place to draw the line which Congress considered very carefully was between allowing people to do things themselves and allowing, and seeking to spend more than \$1,000.00, also really more than \$1,500.00 because you get \$500.00 in incidental expenses if you do it yourself and I am --

Byron R. White

This is the least and intelligible?

Archibald Cox

This is the most daily claim.

Byron R. White

Yes.

Archibald Cox

This is the clearest [Laughter]

I would make -- I would make if I may just two further sentences.

First, I would say that in fact individuals do not, just a matter of observation, spend large sums of money, broadcasting their own speeches, putting their own writings in newspapers and second, the reason I emphasize my agreement with the proposition that the line can hardly be drawn between personal involvement in a paid advertisement that no real personal involvement in the paid advertisement, the reason I stress that is that they chose the importance of Section 608 (e) to the whole plan, that this would be as the Court below recognize an exceedingly serious loophole.

I do not think it would render the whole plan inoperable, but it would be an exceedingly serious loophole which would raise the whole pressure over again, but I express just one last thought on this point Mr. Chief Justice.

I point out that there is no plaintiff here who alleges that he or she desires to spend money publicizing his or her own speech and that this most extreme application of 608 (e) might well be treated as hypothetical, not properly before the Court and the argument of overbreadth could and I think should be rejected on the ground that through most of its application, Section 608 (e) is like the restriction on contributions, and that therefore, the doctrine of overbreadth does not apply and the particular cases can be dealt with if and when they ever arise.

Thank you, Mr. Chief Justice.

Lewis F. Powell, Jr.

Mr. Cox, before you sit down may I ask this question?

Section 608 (e) limits citizens in what they may stand, advocating the election or defeat and I think the language is a clearly identified candidate.

Does the Act give any assistance as to how one determines who is a clearly identified candidate or does the Citizen Act it is parallel?

Archibald Cox

Well, to say any citizen may ask the Federal Elections Commission for a ruling on that part and will be protected in following the ruling.

Lewis F. Powell, Jr.

Take the present situation.

Suppose that question was put to the Commission today in this forum, as of today, who are candidates for President in 1976, what could the Commission say that would be accurate?

Archibald Cox

I do not think that the Commission has and it would any occasion to answer that question.

The question that would be put to it would be whether the speech with sufficient clarity identified a candidate and whether it urged nomination or election that I suppose in this sense, if the --

William J. Brennan, Jr.

You mean, even as to a candidate not formally declared to be such, the Commission might find him nevertheless a candidate?

I want an advice or the opinion for purposes of 608 (e)?

Archibald Cox

As Section 591 (b) on page 37 of the Statute, defines a candidate is an individual who seeks nomination for election and so forth.

So it involves some seeking on the part of the person.

William J. Brennan, Jr.

You mean a formal declaration that he is a candidate?

Archibald Cox

Well, I suppose there is a question, what seeking means and I am not aware of that interpretation.

William J. Brennan, Jr.

There are as I read the newspapers and listen to this news, television news reports and so forth, some individuals who say they are not yet decided whether they are candidates or not (Voice Overlap)

Archibald Cox

I know nothing beyond the statue on this point.

If I would take it that someone who is disclaiming concerned who says they would not accept the nomination is not a candidate whatever the newspaper say.

Lewis F. Powell, Jr.

Mr. Cox, before the Republican convention in 1916, Charles Evans Hughes, I take it was not a candidate, but suppose citizens had been spending large amounts of money promoting him, indeed some people did, would this Act apply to him?

Archibald Cox

I confess that I do not recall the facts of 1916 election well enough to say that.[Laughter]

I would -- 1924, I can speak to when Calvin Collin said, "I do not choose to run," I suppose he was not seeking the nomination, although --

Lewis F. Powell, Jr.

How about 1952, up to a point Adlai Stevenson was very shy?

Archibald Cox

Well, I do not deny that cases could be put that are close to line on this point Mr. Justice.

I do not think there is any statute that could possibly avoid that question.

The same problem has come up in deciding whose names must go on primaries and election list.

I just have to imagine that anyone seriously risking prosecution under 608 (e) because of they are writing a letter, urging that so and so who is not yet a candidate ought to run or something like that.

Sending a \$1,000.00 check?

Criminal penalties?

Archibald Cox

It is a certain -- I am referred and I do not want to take the Court's time to be enlightened on my ignorance for which I apologize, I think if you will read 591 (b) and with care, you will find that it throws more light than I have been able to give on this question.

I am sorry to espouse.

Harry A. Blackmun

Well, I gather Mr. Cox that advisory opinions are not available to any citizen, only to candidates and protocol committees, are they not?

I cannot go to the Federal Election Commission and ask them, if John Jones has risen to candidate?

Archibald Cox

Well, you would have no statutory right to it.

I am not sure if the Commission will refuse it.

Warren E. Burger

Mr. Winter.

Ralph K. Winter, Jr.

Mr. Chief Justice and may it please the Court.

Let me just briefly clear up one part point of confusion, found on one of our appendix page 39.

It alleged that Steward Mott desires to make independent expenditures on behalf of a candidate in excess of \$1,000.00 and the other candidates who are plaintiffs, appellants here make allegations that they wish to have people make such expenditures on their behalf.

Let me also address the question of the meaning of Section 610 in the segregated funds.

I must confess that we see vagueness there as else where and we are not able to endorse the Attorney General's flat position that Unions and Corporations may spend unlimited amounts from segregated funds.

I do not think in any sense that even if it is read to mean that they must spend through six-month political committees, the statute still gives them relatively far more power than they had previously.

They are permitted, first under Pipe Fitters, the Unions and the Corporations clearly control the dispersal of the funds.

That is the explicit language of Mr. Justice Brennan's decision, I believe it was, is that we hold, at page 384, we hold that such a fund must be separate from the sponsoring Union only in the sense that there must be strict segregation of its moneys from Union dues and assessments.

And I take it that continues now, otherwise it would violate, if the Union or Corporation did not control the funds, it violate the probation on earmarking, so that they do control the funds.

Now, they are permitted --

Lewis F. Powell, Jr.

Mr. Winter.

Ralph K. Winter, Jr.

Yes sir.

Lewis F. Powell, Jr.

While you are in this subject, is there any limitation, assuming that the committee limitation applies to Unions and Corporations on the number of committees that a Union or a Corporation could organize?

Ralph K. Winter, Jr.

We say no in the statute, Your Honor.

Lewis F. Powell, Jr.

It cannot run under the Pipe Fitters, is there?

Ralph K. Winter, Jr.

No, I would think that it would have to -- I would think that the FEC would have the rule by theater or however they do it.

Lewis F. Powell, Jr.

You could probably have a committee at a minimum for each subsidiary Corporation and each local Union?

Ralph K. Winter, Jr.

I would certainly think that is true, yes and where you have interest like the daily interest on a County basis, that can be done horizontally across the country.

There is three reasons why Unions and Corporations have great power under statute relative to other groups.

The first is that they can engage in unlimited spending to raise money for the segregated funds.

As far as we can tell from a statute they are permitted to spend as much as they want from their treasuries to raise money from a members, employees and stockholders.

Second they can spend unlimited funds to communicate with employee, members and stockholders and this alleged or is believed of great value because communications with those people necessarily reach large numbers of other voters.

William H. Rehnquist

How does this fit into your constitutional argument?

You say that Unions and Corporations have great power, but that by itself does not demonstrate that the statute is unconstitutional?

Ralph K. Winter, Jr.

I think it does and it fits in two ways.

One, I think it is facial discrimination and a regulation of content.

Here we have almost exactly the situation faced by the Court in Mosley where there is a general probation on a certain kind of a speech with an exception made for labor organizations.

Secondly, Justice Rehnquist, I think it shows beyond any question that there is no rational relationship between the ends that are used to justify the statute and the means employed.

This record, this appendix is thick with contributions by business and Union interests which the statute is alleged to diminish, whose influence the statute was supposed to stop and indeed the allegation is made over and over again, that the prime source of corruption or improper obligation comes from organized economic interest groups.

I think if we show that in fact under the statute and I think we shown, convincingly, that under the statute that those groups have more power relative -- relatively more power because of the limitation placed on other groups and the freedom left to them, I think we have shown its unconstitutionality.

The third way in which they are made relatively more powerful is that the six-month political committee provision is really tailored to their use for purposes I have explained before and allows them to spend five times as much as other kinds of committees and individuals.

There is nothing anywhere that I know off in the legislative history of the statute, suggesting in anyway that any justification for those provisions and that have to do with the asserted justifications for the statute.

Now, reference has been made to the legislative history of the limits, I think when the Court addresses the legislative history or finds it, it is quite simple, they kept going down.

From the original proposals, they got lower and lower and indeed we are in some disagreement with Mr. Cox's description of the situation and I believe it was November, 1973 when common clause testified before Congress.

I am reading from Mr. Gardner's testimony.

The bill passed by the Senate would allow candidates for the House to spend \$90,000.00 in primary races and another \$90,000.00 in the general election.

Some have advocated expenditure limits substantially lower than those contained in that Bill, 35, 000; 42,500; 50, 000 are among the figures which have been mentioned as preferable.

Common clause considers that any substantial reduction of the figures in S-372 which was 90,000 in both elections, would virtually guarantee a permanent re-election of incumbent members of Congress.

Now, of course they did reduce the limits after that and in fact it would not adjust for inflation, the limits of the senate bill at that time were a \$100,800.00 for each election.

So there was a various substantial reduction after that.

The legislative history in the Senate, repeatedly, floor managers and the like in the Senate stated that the House could write their ticket to the Senate or not review what the House was doing.

Now, I think it is clear in our brief what our objections to their statistical figures and in particular the comparison with the overall combined limit in that the statute in no way permits candidates to aggregate.

You have to spend to influence a particular election and comparison -- comparing previous spending with an overall combine limit, comparing that with previous spending by candidates who had one serious race, simply does not make any sense.

I might also say, suppose it does not for a challengers, suppose it is as even handed, no one really denies that it is not going to affect the outcome of elections.

No one really plans that is not going to have an impact.

Indeed the whole reason was to reduce the amount of political speech in which people were engaging.

That seems to me clearly the party will affect the outcome of elections.

It does not matter who is affected, it is still a First Amendment problem.

The public will suffer because of this expose to less and less information, less and less the debate, the less participatory activities by volunteers and the like. Virtually, all the evils that have been suggested in this Court, in no real sense call for limitations on candidate expenditures.

The ones we have now because it costs so much to raise large contributions, really induce candidates to try and raise contributions in as high amount as they possibly can because they save that much on fund raising.

Also, there is no reason certainly to limit campaigns, the amount campaigns can spend whether or not they are raising in a large contributions.

This statute limits -- would have put limits on the campaign of a candidate like Ramsey Clark who has announced, who did announce that he would not spend over -- would not receive contributions over a \$100.00.

Now, I have not heard anything today which would call for limits on expenditures, extraordinary spending provisions for state and national party committees, distinctions between kinds of committees which permit greater freedom to some than to others and indeed, I would think that if Congress was serious about what it was claiming it was doing or if it had sought and considered a far simpler law, it might have had a better solution, not just the better one but one more constitutional.

A law that restricted total contributions of individuals, to candidates or committees to say something like a total of \$35,000.00 in an election year and adequate disclosure provisions for timely notice of large contributions, would prevent corruption, bring about a quality at least as much as the FECA and yet would not have the same stringent impact on challengers, to incumbents or other candidates.

We do not say it is a constitutional, but of all the major constitutional issues in this Court, all but one, disappear with a law of that kind.

Nothing demonstrated in Congress or in the record here calls for either the complexities or the intrusiveness of the FECA.

We filed this Amicus attack is for the extend of our challenge, but this complex network of intricate distinction is just wholly unrelated to the purposes of the statute and itself is a signal that more loopholes more, more inequalities are being created.

I think that 608 (e) demonstrates the intrusiveness of this law.

The idea that a law putting almost a flat ban on the purchase of political advertising by individuals, can be called a loophole-closing provision.

It is not only contrary to the major trust Court's decisions for years, but demonstrates just how intrusive this statute is on the free political debate in this country.

Potter Stewart

Mr. Winter, we were told by Mr. Cox and perhaps others that a vast majority of the individual 50 States have analogs, statutory analogs to the disclosure provisions of this legislation and to the limitations, provisions of this legislation both upon contributions and expenditures.

Do you know -- are there any state analogs to 608 (e)?

Ralph K. Winter, Jr.

I think in Florida -- Florida I believe has one.

Yes.

Most of the state laws as I understand it, the Florida law is the stringent, most of the state laws resemble the prior Federal law which was not --

Potter Stewart

Which was disclosure primarily and --

Ralph K. Winter, Jr.

Well no, it had limit --

Potter Stewart

And limitation?

Ralph K. Winter, Jr.

But not effective limitation.

Potter Stewart

I know.

Ralph K. Winter, Jr.

So that --

Potter Stewart

But you said that you know of at least one state (Voice Overlap)

Ralph K. Winter, Jr.

I understand Florida that -- I think -- I believe and I might be wrong, but the Florida provision I believe gives the candidate a veto on expenditures.

I am not sure that.

It is similar to the --

Potter Stewart

To the predecessor of 608 (e)?

Ralph K. Winter, Jr.

Right.

I think that is right, but I could be wrong.

I think that the extent of pebble in First Amendment law is nowhere better demonstrated in the arguments and briefs presented here.

Every time the appellees put their First minute positions in the form of a generalization, it is just foreign to established notions of freedom of expression.

Instead of a robust, uninhibited debate, they draw analogies between oral arguments in Courts with equal page links and equal time for argument and explicit call for a drastic application, I would think of something like red-line to the whole political process.

Byron R. White

Mr. Winter, what do you suggest Congress was trying to do in this statute?

I understand perfectly well what you think.

Whatever it was trying to do was unconstitutional.

What do you think it was trying to do?

I suppose we must accept the -- what on its face it seems it was trying to do.

It was aimed at limiting corruption, I supposed.

Do you say it was aimed at something else?

Ralph K. Winter, Jr.

I have trouble.

I think that Congress because of Watergate, was under enormous political pressure to do something.

Byron R. White

Explaining why -- tell me what do you it was trying to do if it was not trying to do that?

Ralph K. Winter, Jr.

Well, Your Honor our opinion I gather is --

Byron R. White

You probably do not have to (Voice Overlap)

Ralph K. Winter, Jr.

-- draw inference, is that they were under pressure to do something and as one unidentified Congressman was alleged to have said and was quoted in the papers, any time they could vote for reform and freeze out, vote for what was called reform and freeze out opponents at the same time, there was only one thing they could do and I am being pushed to make an argument, I think I -- but that is our opinion.

Byron R. White

Well, I do not know I think it -- do you accept the goal that the Congress was aiming at or not?

Ralph K. Winter, Jr.

The elimination of corruption?

Yes sir.

Byron R. White

Then what time to do that?

Ralph K. Winter, Jr.

No, I accept that as a proper goal.

I do not think that --

Byron R. White

But you do not need -- you say Congress was not really seriously attempting to point.

Ralph K. Winter, Jr.

Yes sir and I can point to explicit provisions.

They reduced the statute of limit, dropped the statue of limitations by two years for Watergate related crimes.

They passed the provision explicitly permitting them to spend their excess campaign funds for --

Byron R. White

Limitations on expenditures or contributions you would not accept those as any serious effort by Congress?

Ralph K. Winter, Jr.

No I think --

Byron R. White

Through Court of law?

Ralph K. Winter, Jr.

I think arguably the limits on contributions does seem to move in that direction.

Expenditures absolutely, I think that does move any direction of --

Byron R. White

Any alternative suggestions what they were trying to do with expenditure limitations?

Ralph K. Winter, Jr.

For what they were trying to do?

I think that both of those provisions badly damage challengers to incumbents and I --

Byron R. White

You think they have resisted.

The incumbents were just riding themselves into a permanent seat, is that what you say?

Ralph K. Winter, Jr.

Well, they are under a lot of political pressure to do something and this was the most palatable thing that could be done.

Warren E. Burger

Were you suggesting in polite way that this was cosmetic legislation?

Ralph K. Winter, Jr.

Well if so, it is something that the Consumer Product Safety Commission should look at because it is a cosmetic that involves asset and is given only to challengers.

I suspect, I see very few limits in here on things that might lead to corruption.

For instance, they can take unlimited, undisclosed funds for office accounts and for preparing materials to send out under the fact.

That is simply inconsistent with a desire to eliminate corruption.

It is just totally inconsistent with it, quite apart from the discriminatory effect against challengers.

Lewis F. Powell, Jr.

Mr. Winter, it is not clear to me what happens to excess contributions.

Take a congressman, he is limited to \$70,000.00.

Suppose its contribution has totaled \$100,000.00, what would he do with that \$30,000.00?

Ralph K. Winter, Jr.

Well he can do several things.

He can put it in an office account --

Lewis F. Powell, Jr.

His office account?

Ralph K. Winter, Jr.

Yes or he can -- the statute explicitly says he can use it for any lawful purpose, to any lawful purposes for the ward.

Lewis F. Powell, Jr.

And he gave it to the body for constituents?

Ralph K. Winter, Jr.

That is the way we read it sir.

Lewis F. Powell, Jr.

What happens to the appellant who loses, who has \$30,000.00 in excess?

Ralph K. Winter, Jr.

I do not -- it does not say what he can do.

Lewis F. Powell, Jr.

Can he give a party for his clients?

Ralph K. Winter, Jr.

That I suppose would be up for the FEC.

Warren E. Burger

Mr. Clagett.

Brice M. Clagett

Mr. Chief Justice and may it please the Court.

Appellant's position is; first, that any mechanism for direct federal funding of political parties and candidates is unconstitutional and second that the particular mechanism Congress has chosen, embraces a number of unconstitutional discriminations among particular candidates and parties.

With the Court's indulgence, I will reverse the order of our briefs and discuss the second question first.

I begin with Chapter 95 which provides for general election federal subsidies for some, but not all presidential candidates.

The basic device of course is the distinction between major parties, which one more than 25% of the vote in the prior election.

Minor parties which won between 5% and 25% and so called new parties which are they really are new or else are old won less than 5% at the prior election.

Major party candidates are wholly relieved of the need to seek private contributions.

They are furnished their entire expenditure limit \$20 million at the outset of the campaign.

Minor parties, if there are any which they would not be in 1976, receive a prorata share, dependent on the ratio of their prior vote to the average vote of the major parties.

New parties receive nothing, but if they win over 5% of the vote in the in the current election, they purportedly can receive post election funding, though we shall see that, that alleged entitlement is almost completely illusory.

Independent candidates not identified with the party, receive nothing at any stage, no matter what their vote is.

A most serious problem with this scheme is the treatment of new parties.

We think the 5% threshold first, although this is not the most serious objection, is too high.

It is much more onerous than the nominally similar threshold sustained for ballot access in Jeness versus Fortson because that scheme allowed petition signed by persons who at the prior election have voted for other parties.

Since this is clearly a prior vote qualification it requires that the member of the 5% not have voted for anyone else and not to stay at home.

The Jeness court relied heavily on the open aspects of the 5% that anyone could sign the petition even if he just voted in a primary two weeks before that for another party and in Jeness you upheld that 5% figure with strong intimations that were not for those open features not present here, 5% would be too high.

William J. Brennan, Jr.

Mr. Clagett I know this is not -- I just to get it.

If one is a presidential candidate, elects to take public funding, he cannot take private contributions, can he?

Brice M. Clagett

Not if it is a major candidate, Justice Brennan then he gets his full 20 million and he has to promise and address that he would not take any private contributions.

William J. Brennan, Jr.

And if any is contributed what happens what happens to it?

Brice M. Clagett

I think practical answer would be that he would know, he is not the major party candidate who qualifies until after the convention and surely by the time the convention or immediately thereafter he would make his decision which route he is going.

If he is a minor party candidate, he just has to agree not to take any contributions that would put him over to the limit and it says in addition to whatever public funds he gets.

Byron R. White

What about primary?

Brice M. Clagett

Primary expenses well that Chapter 96 which I like to deal with separately if I might.

Potter Stewart

That is matching funds?

Brice M. Clagett

That is matching funds and the issues are quite different.

Potter Stewart

Quite different.

Brice M. Clagett

The 5% requirement involved in this statute is very much like the 5% requirement which you are unable to accept in Storer versus Brown, very much like it functionally.

It is relevant here by the way I think that 42 states for ballot access have 1% or less as a petition requirement.

The other side is relied for other purposes on state practice and the general state practice is that 1% is about the maximum which is thought reasonable to require on petitions for ballot access.

Potter Stewart

That is for ballot position, ballot access?

Brice M. Clagett

Yes, Justice Stewart.

Potter Stewart

Has nothing to do with financing as such?

Brice M. Clagett

Well, except to the extent that the two factors maybe comparable by analysis.

Potter Stewart

To the extent that the states do publicly finance their elections?

Brice M. Clagett

Ten or fewer.

Potter Stewart

Yes.

Brice M. Clagett

Yes sir.

The most egregious discrimination in Chapter 95 is that no way is provided for new parties to qualify by petition at all.

They are excluded entirely on the basis of prior vote performance.

I want to make it clear again that throughout, I will be using new parties in the sense the statute does, that party could be a hundred years old and still be a new party.

In view of the dead hand of the prior election in wholly excluding new parties, the reliance of appellees and of the Court of Appeals indeed on *Jeness versus Fortson*, we think is completely misplaced because the statute upheld in that case permitted a petition requirement, the 5% there was a petition 5%, not a prior vote 5%.

Indeed every one of the ballot access cases involved a petition alternative route to get on the ballot, instead of being limited or excluded on the basis of prior vote statistics.

Some of those means you have held too onerous, and some of them you have held reasonable, but in everyone of the cases there was a route.

Here there is not route, no way.

If a party one year after the 1976 election or three years after the 1976 election comes into existence, there will be no way it can receive prior pre-election funding in the 1980 election.

Appellees have failed to suggest any reason whatever, like qualification for federal funds by a petition could not and should not have been incorporated in Chapter 95.

Such a readily available mechanism while solving all constitutional problems, would have provided a new party with some means to qualify.

It will avoid that the plain irrationality of making illegibility for these subsidies depend entirely on four-year old election statistics when conditions may have been totally different.

Post election funding which the statute purports to provide is no solution.

Obviously, funds provided after the election is over are off no use whatever to a party in trying to win the election or to make the substantial impact on it.

Moreover, if that were enough, this theoretical entitlement to post election funding is rendered almost completely illusory by the provision that it can be used only to repay loans, which is what the statutes says.

The result will be that only a tiny fraction of a new party's expenditures, if any, will be reimbursable, even though the party otherwise qualifies.

No reason has ever been suggested to our knowledge why that restriction could not have been omitted and new party is allowed to recover post election funding, if they qualify by five or some other percent, could recover subsidies equivalent to the amount of their expenditures, not of their expenditures made through loans, then they could have used that money for their general party purposes or to prepare for the next election.

They at least would have gotten something that might do them some good in the future, even though it would not do them any good in the current election.

William H. Rehnquist

Which of the appellant Mr. Clagett is a new party as defined in the statute?

Brice M. Clagett

The Libertarian party, the Conservative Party of New York.

Potter Stewart

Republican Party of Mississippi?

Brice M. Clagett

No sir that is a part of the National Republican Party which is a major party.[Laughter]

If we had congressional public financing, it might well qualify and the Appellees are trying to get that too.

Senator Metcalf's amicus brief points out entirely accurately that this incredible restriction that you can only get post election funding to pay back loans that you have made that you have incurred, that this restriction penalizes new parties for having been able to raise contributions rather than make expenditures on credit.

Whereas for major parties under Chapter 96, major party candidates of the primary stage are rewarded for getting contributions, just makes no sense to us, unless the purpose is discriminatory, certain the result is.

This system, especially when coupled with the expenditure and contribution limits, leaves new parties far worse off than they are now.

They are declared unworthy, if federal funding because of their modest support, but simultaneously they are denied the right to try to increase that support by seeking large contributions to pay for heightened campaign activity.

In fact, in presidential general elections since the major parties are fully subsidized.

The contribution limits apply only to minor and new parties and independent candidates.

Only they must bear the burden of those limitations and must incur the large cost of trying to raise small contributions.

The contribution limits of the Presidential Election, the general election stage have no effect whatever on the major parties.

Byron R. White

Would it cure your problems if the minor parties or the new parties were not subject to the contribution limits?

Brice M. Clagett

No, Justice White, it would not.

We think that the --

Byron R. White

(Voice overlap) the expenditure?

Brice M. Clagett

Well, the expenditure limits are bit academic as a part to minor parties at least at the Presidential level.

Byron R. White

The contribution limits?

Brice M. Clagett

The contributions limits are by no means are academic, but even if minor parties were free to raise large contributions, they would still have to raise money privately while the major parties were being subsidized by the Federal government and we know of a no rational basis for that discrimination, certainly not at the 5% prior vote threshold level.

Possibly at a 1% current petition threshold level maybe.

We are not saying there is no threshold that might not be constitutional, excuse me, that might be constitutional.

Appellees answer to all these discriminations as the third parties and independents are benefited by the expenditure limitation since they will now be able to spend more in relation to major party spending, but you cannot spend money if you cannot raise it and nobody gives it to you.

Even besides that, a minor party is not concerned with what a major party spends.

It is sole interest is being able to raise and spend itself enough to wage a viable campaign thus for someone like the appellant Libertarian Party, I can assure you that it does not feel fortunate because the Democrats and Republicans are now limited to \$20 million each when it is cut off from every reasonable sources of funds to wage any kind of campaign that could get itself better known and maybe gradually over a process of years make some progress towards becoming a major party, which is of course it is objective.

Warren E. Burger

That this party of the kind you have just described is waging an issue campaign without any real hope through electing its candidates necessarily?

Brice M. Clagett

I do not believe the Libertarian candidate for President this year believes he will elected, but it is not only an issue campaign.

I think any party of this nature will be looking ahead down the road to future elections, maybe eight years from now, maybe 12 years from now.

That is a party of the kind of Libertarian party's nature.

Now, there are other kinds of third parties which would be also new parties under the statute.

The American Independent Party would have been a new party in 1968 and would have been completely shut out from campaign financing.

Potter Stewart

Was the Republican Party under the statute had been a new party in 1860, when Abraham Lincoln first (Inaudible)?

Brice M. Clagett

No sir, it would have been a new party in 1856 and that is where it would have had its throat cut.[Laughter]

Potter Stewart

He would never have got in 1865, in your submission?

Brice M. Clagett

Precisely.

One bizarre result of this statute is that if a third party ever does manage to qualify for federal funds, its life will be unnaturally and artificially prolonged.

If these provisions have been in effect in 1972, John Schmitz would have received more than \$6 million in federal general election subsidies on the basis of George Wallace's election day performance in 1968.

Harry A. Blackmun

The other side of that coin of course is that Governor Wallace did a lot of noise and was heard four years before?

Brice M. Clagett

Yes sir, but third parties typically arise we think and George Wallace's 1968 candidacy is maybe not wholly typical, but it is not wholly a typical either.

They typically arise either to give some outlet to a transient wave of popular sentiment or is the vehicle of a particular candidate which was certainly true of Wallace in 1968.

John Schmitz just did not have the capacity to draw that kind of vote.

If a party of that sort makes a substantial impact in one election, then the usual consequence is that it goes on to higher things or else the other party is adjusted and it is absorbed back into one of the major parties.

But artificial preservation of third parties whose time has passed is an inevitable result of basing federal subsidies on prior election performance.

I must say something about Chapter 96, the matching grant provision.

The subsidy amount that candidates can receive under matching grounds is made wholly dependent on the private contributions that candidate has raised, that is it is a wealth criterion, similar to one you struck down in *Bullock versus Carter* and *Lubin versus Panish*.

Surely what should matter is the number of contributors to or supporters of a candidate.

Instead a single contributor can command the matching funds checked off by 250 of his fellow citizens on their tax returns.

The entire scheme rewards the candidate who gets into the race earliest, who can command the largest number of \$250 contributors and who is supported by a special interests, which can easily help him meet the 20-state requirement.

A candidate who comes in at the later stage, perhaps in response to some new development or some newly perceived political issue is heavily disadvantaged.

The provision is in fact working exactly in this way.

That is demonstrated by the figures on page 52 of our reply brief, showing what the presidential candidates have raised to date and what they have on hand.

It is apparent from those figures that the great bulk of available federal funds is likely to go to only two of the twelve present candidates, Governor Wallace and Senator Jackson.

Most of the others even though have raised substantial private funds, have dissipated almost all of them before the campaign for votes even begins.

Potter Stewart

What page of your reply brief?

Brice M. Clagett

52.

Potter Stewart

Thank you.

Brice M. Clagett

-- have dissipated almost all the funds they raised, you can see that by the right hand column showing what they have on hand, in a desperate attempt to raise more small contributions.

Most of these candidates will be so crippled for funds that whatever federal matching grounds they receive will not prevent them from being driven out of the race at very early stage.

This legislation has made money more important in campaigning than it was before, not less important as it allegedly was supposed to do.

Those problems are compounded by the fact that the mechanism for dispersing the matching grounds is so fraught with uncertainty and so dependent on diaphanous prophesies that have to be made long before they can be made, that the results may be unfair or random in the extreme.

We set out some of these problems at pages 70 through 73 of our reply brief.

The day after that brief was filed, the Assistant Secretary of the Treasury, testifying before the Federal Election Commission, confirmed everyone of those concerns we had expressed and added some new ones.

We have lodged this testimony with the Court.

It is now clear after his testimony that funds may be inadequate to pay all the candidates who qualify and that what funds are made available will depend on guesses as to what third parties may enter the ultimate general election campaign and what their election day performance might be, this in December or January and there is a distinct possibility that all the available funds will be exhausted by the first two candidates who qualify, Wallace and Jackson, thus discriminating against those who qualify thereafter.

Finally, the difficult decisions that must be made by a partisan political appointee.

President Ford, the Secretary of the Treasury is going to decide how much money President Ford and Mr. Reagan get for the New Hampshire primary, that is a curious litigate for forum.

There are other discriminations that I have not even been able to touch on like the exclusion of appellant McCarthy solely on the ground that he is an independent rather than affiliated with a political party from any subsidies at any stage.

We think that some problems of this nature, whether the same ones or other ones will be present in any kind of Federal subsidy scheme that is formulated.

Any such scheme will establish some parties by favoring them over others, just as this scheme establishes the two existing major parties.

As Mr. Justice Douglas wrote in *Abington School District versus Schempp*, the most effective way to establish any institution is to finance it.

Such political establishments, we think, cannot be squared with freedom of speech of association or with the general welfare or indeed with the provisions of Articles 1 and 2 which contemplate free elections in this country.

Most of these objections would not apply to a genuine check off scheme, whereby each citizen would designate party or a candidate to receive the sum he checked off.

There is nothing impractical about a scheme like that as we have shown in our reply brief.

If there is anyone for federal involvement in the campaign funding mechanism at all, such a method would plainly be less intrusive mean.

Thank you.

Warren E. Burger

Mr. Cutler.

Lloyd N. Cutler

Mr. Chief Justice and may it please the Court.

Since Mr. Clagett has not invested much of his oral argument in his arguments as to the power of the Federal Government under the general welfare clause to provide for public financing of election campaigns and since he has not devoted much time to his argument that any such plan violates the Establishment Clause of the First Amendment which he moves by implication over into the free speech Section of the First Amendment.

I shall concentrate, as he did, on the alleged discriminatory effects of this particular proposed public financing plan against the smaller parties.

I would like to first stress that the appellants show little proof of injury to them to support their claim that these provisions should be voided before they have had a chance to work in a single election.

Of the twelve plaintiffs in this action, only four assert any interest in the public financing of presidential campaigns.

One is Eugene McCarthy whose claim is wholly academic as to discrimination because he has testified on deposition in this case, that he would have not accepted public financing even if he was eligible.

William H. Rehnquist

He has no standing for that reason to complaint that somebody else has get it?

Lloyd N. Cutler

If this were an attack on any public financing, Mr. Justice Rehnquist, yes.

But the attack at least on the discrimination front is an attack that the public financing provided to the so called major parties is a discrimination against him.

William H. Rehnquist

And you say he cannot attack that because he would be --

Lloyd N. Cutler

We say he presents no case to you that he is being discriminated against by reason of the 5% provision or the money before or money after provisions when he says I would not take it anyway, if it were offered.

The same is true of course of his party, his committee for a constitutional presidency which is a second plaintiff.

The same is true of the Libertarian Party which testified on deposition that it would not accept public financing if offered and in the case of the fourth plaintiff, the Conservative Party of New York has never nominated a presidential candidate who was not also a candidate of the major party and thus entitled to the full allotment.

And no other political party or any present aspirant for their 76 nominations is before you in this case, although the Socialist Workers Party has filed an amicus brief.

So most of the fascinating hypotheticals which fill appellant's briefs and our replies what would have happen in 1856, Mr. Justice Stewart, whether the equal amounts for the first and second parties are unfair as between the two of them or vis-a-vis third party, what would have happen of, Bull Moose, Eugene Debs, we say or just at the moment at least fascinating hypotheticals for the political huts totally that can justly and should better be left for another day.

Warren E. Burger

Mr. Cutler, refresh my memory if you can on the largest percentage of vote that any third party has ever received in our history?

Lloyd N. Cutler

It depends on how you define third party Mr. Chief Justice.

If you define --

Warren E. Burger

Well third, went after the first two in any particular election?[Laughter]

Lloyd N. Cutler

Well, if you say after the first two in any particular election and if you ignore some of the very early elections in the 1832 period and thereabouts, I suppose the largest percentage would be the percentage compiled by Bull Moose, by Mr. Roosevelt when he was running in 1912, which I believe is of the order of 29% to 30%.

The reason I asked about how you define the third party is there are several other new parties running for the first time in a new election that did much better than that.

There are some if I can find my reference for a moment such as --

Warren E. Burger

The next nearest to Mr. Theodore Roosevelt support the Senator LaFollette back in the 20's?

Lloyd N. Cutler

I have not.

Senator LaFollette, got about 9% I believe.

All of these figures are -- well, I believe they are in the joint appendix at about pages 34 and 35 of Volume 2 (a), but there are candidates of course like Mr. Fremont, the Republican candidate in 1956, who finished as the second candidate in that year.

There are candidates like Governor Wallace in 1968 who got I believe something like 12 ½% to 13 ½ % of the total vote.

Indeed there are in the 36 elections, since 1832, defining small parties as parties coming on the scene for the first time or too small parties.

There are ten examples in that table I referred you to.

It is pages 35 to 42 of Volume 2 (a), ten examples in 36 elections of candidates who achieved better than 5% so it is a no sense an impossible dream.

The appellant's focus on the 5% floor based on votes in the preceding election as a condition of pre-election financing and based on votes in the current election as a condition of post election financing as their principal claim of discrimination.

And I would like to deal with that first from the standpoint of the floor itself and second as from the standpoint of the alleged discrimination between pre-election and post-election financing.

These provisions are attacked as showing a studied congressional disregard for the third parties, but to the contrary as the Court of Appeals found, that Congress took great care neither to favor nor to disfavor the smaller parties and it fixed on the 5% floor and the other objectively measurable features of this plan in a careful effort that it was found in belief that it was following the guidance of this Court.

The original public financing measures, you may recall was enacted in 1966.

It set a floor of 7% based entirely on results in the preceding election.

Nothing whatever was provided based on results in the current election.

That law was suspended by Congress the following year.

In the next year, in 1968, you decided Williams against Rhodes and in 1971, you decided Jeness against Fortson and it was based on the guidelines provided by those two opinions that Congress in 1971, just a few months later enacted the fore runner of Chapter 95.

And, the 5% figure was taken directly as I said from Jeness, based on the holding that before providing access to the credit ballot, a state can reasonably require a showing of a significant modicum of support and that 5% was a reasonable flow for that purpose.

And if you look at the report of the Senate Rules Committee, proposing that legislation, you will see it refers specifically to Jeness and to Williams against Rhodes that it specifically recognizes the constitutional right of a minor party to grow into a major political force and that it correctly, we believe said quoting Jeness, that it's Bill did not freeze the political status quo.

William H. Rehnquist

Mr. Cutler, do you think that perhaps the state might have more latitude than Congress since the state that is responsible for the physical preparation of the ballot and the limitation somehow of the size of the ballot, whereas presumably Congress does not face exactly that problem doling out money?

Lloyd N. Cutler

I see a distinction, Justice Rehnquist, between the preparation or between a standard for qualification to be on the printed ballot perhaps and qualification to receive federal financing, but I do not see any other distinction between the constitutional standards applicable to the state and those applicable to the federal government or the need that either is trying to serve in disposing of frivolous candidacies and doing its best to see that the election itself does not suffer from splintering and serves the idea of a two-party system as long as it does not favor two particular parties.

William H. Rehnquist

What interest is Congress pursuing in as you say making sure that thing does not splinter?

I mean, how would you define that, is it a legitimate or desirable goal on the part (Inaudible)?

Lloyd N. Cutler

Well, if I would define it and precisely the way I believe the this Court defined it in *Storer Against Brown*, in *American party Against White* and in others of state ballot and state primary financing cases in which you held that one of the legitimate public aims of the government would be to foster some stability in the political process by having the ultimate election at least be one that was not an opportunity to continue the sort of intra party fights that had going on during primaries and during the preparatory process, so that the ultimate outcome of the election could come as close as possible to reflecting the views of a majority.

William H. Rehnquist

And you see no distinction the state's role and Congress' role --

Lloyd N. Cutler

Well, I do not see it, Mr. Justice Rehnquist, in the sense that the same interest, if it is applicable at the state level is infinitely more applicable at the national level, considering that many responsibilities on the national government and the interest that must exist at the national level to not to have the problems of many splinter parties none of which has a majority and not to have a President elected either by a plurality or perhaps even by a minority of the electorate.

Appellants have argued that the 5% figure upheld in *Jeness* was less restrictive because it was a figure for a petition that could include voters who had voted for other candidates in the preceding election or who had signed other petitions.

But the 5% in this floor may well be a less onerous requirement because it is 5% of a much smaller universe.

It is 5% of the 60% or 70% of the electorate at votes which is something in the national scale of the order of 4 million people, rather than 5% of those registered as eligible to vote which must be well over 5 million because the number of eligible, when I say -- I will correct myself, not eligible to vote, registered to vote, because of the number of eligible voters in 1976 is estimated to be something of the order of 150 million people of whom or probably well over 100 million will actually be registered.

Appellants have not proven as the Court said in *Jeness* that one 5% goal as any significantly harder to reach than the other and it would seem to us that this one satisfies not only the test of *Jeness*, but also the test of *Storer against Brown* which also was 5% of the votes cast in the preceding election, although it was on petition basis, but the Court had trouble with that level in

Storer against Brown not because it was 5% of the voters in the preceding election, but because excluded from that universe or any people who had voted in the primaries, something that does not happen here.

We would also say that even if Congress was constitutionally wrong in setting a 5% floor of votes as a condition for public financing that would not require the chapter to be invalidated in its entirety.

When a statute discriminates unconstitutionally because of under inclusion, the Court need not declare that statute a nullity, but can extend the coverage of the statute to those who are grieved by the exclusion if that would better effectuate the legislative purpose and of course you did that last term in Weinberger against Wiesenfeld in which you found it was unconstitutional to bar Social Security coverage for widowers while giving it to widows.

You did not declare it unconstitutional to pay widows, instead you took care of it on an under inclusion basis by saying that widowers also had to be paid.

Applying the same theory here, we say it would consist, that certainly be more consistent with the congressional intent rather than to strike down the entire public financing scheme to extend public financing on a proportional basis to parties or to candidates who garnered less than 5% of the votes in the preceding election.

Next, the attack is on any floor based on results in the preceding election because it bars the candidates of parties falling below that floor as well as candidates of no parties or of new parties from receiving any public financing before the election.

They have not suggested anymore workable method of proving before an election and then a significant modicum of support.

The latest idea that Mr. Clagett has put forth signatures of 5% of the eligible voters on a petition, as in the case of Jeness, we would say is highly impractical and certainly whether or not Congress could have chosen that method.

One, it is entitled to have rejected it.

5% of the registered voters in Georgia was 88,000 voters.

5% of the registered voters in the United States as I indicated earlier is probably well over 5 million voters.

For a candidate to compile into the FEC election Commission have to verify some 5 million signatures, voters in 40 to 50 states raises enough questions about cost and feasibility and Jeness according to the stipulation in that case at page 87 on file of the Court, the cost to Georgia of verifying the 88,000 signatures was approximately a dollar for signature.

That cost was something like 75 to \$80,000.00 for each of the two petitions that the Court has reasoned that Georgia had recently cleared in that case.

Moreover, as the Court of Appeals found, the appellants have failed to show that the inability of those who fail the 5% test to obtain pre-election financing, disadvantages them in any way.

Of course, pre-election money would be better than post election money, but even before the advent of major party financing -- of public financing I am sorry, the major party candidates were able to raise pre-election money to a vastly greater extent than the smaller party candidates.

And Chapter 95 is not going to change that differential to the detriment of the smaller candidates.

In 1972, the Republican candidate raise nearly \$60 million privately, most of it before the election.

The Democratic candidate nearly \$39 million privately, most of it before the election.

Even if you applied retroactively the rule of the new statute against contributions in excess of \$1,000.00 and eliminated all of those excesses from the 1972 figures, each candidate raised well over \$24 million dollars.

All of the minor party, presidential candidates combined, raise approximately \$1 million.

1% of the 100 million that the major party candidates raised, if you ignore the \$1,00.00 ceiling and 2% of what they raised if you apply the \$1,00.00 ceiling.

So we would say to you that in 1976, at least if you look at the 1972 figures, the small party candidates and any no party candidates certainly are not going to be worse off vis-a-vis the major party candidates in terms of pre-election funding because of Chapter 95.

In fact, if you take into account, the ceilings on contributions and the ceilings on expenditures, it looks as if they would very likely be better off.

And at the very least as the Court of Appeals agreed, they have not proven any real danger that they are going to be worse off.

Next, I would like to come to Mr. Clagett's point about the constitutionally required alternative means for pre-election financing.

Leaving aside the distinction between pre-election and post election financing, of course, an alternative means is provided in the statute because a party which does achieve the 5% level in the current election will receive post election money and I will get to Mr. Clagett's point about the lone distinction in just a moment.

Warren E. Burger

Mr. Cutler, if the First Amendment violation is found to exist, determined to exist, does it make any difference then whether it operates against small and new parties or for them or against or for the major parties?

Lloyd N. Cutler

I would suppose not Mr. Chief Justice, but I do not apprehend the argument about discrimination in the statute to be a First Amendment argument.

I understand it to be a Fifth Amendment argument.

They are only First Amendment argument against public financing is one which Mr. Claggett did not really address him self to in the oral argument.

Both of us have discussed it extensively in our briefs.

That is the claim that it somehow violates the establishment language of the religion clause of the First Amendment which he would move by osmosis into the speech and assembly portion of the First Amendment.

Byron R. White

Does the Fifth Amendment had question take on a different aspect if you are in the voting -- in election area in terms of what you have to -- what the government might have to show?

Lloyd N. Cutler

Well, I would certainly agree Justice White that any public financing scheme or ballot access scheme which discriminated unfairly against minor parties or new parties would be unconstitutional, perhaps it is just as unconstitutional under the First Amendment as under the Fifth Amendment, but the essence of the showing would be a showing of discrimination.

And absent the showing of discrimination, it would seem to me that the power to provide for the public welfare --

Byron R. White

You are not saying that there is discrimination that is testified, you are saying that no discrimination?

Lloyd N. Cutler

We are saying there no unconstitutionally invidious discrimination.

Byron R. White

There is some discrimination?

Lloyd N. Cutler

At the very least, there is recognition of the differences between the larger parties and the fringe parties just as there was recognition of those differences in Jeness against Fortson.

Byron R. White

And so there is discrimination and you say there is reason enough for it?

Lloyd N. Cutler

I would go back to Mr. Justice Stewart's phrase that sometimes (Voice Overlap) yes,[Laughter]

Potter Stewart

It is differentiation?

Lloyd N. Cutler

Yes.

I would like to come back though to the alternative means that have been provided for pre-election financing.

First, just as the Court in Jeness found that this was one of the alternative means there, an individual aspirant for the presidency, instead of competing for the nomination of a minor party or going it alone, could as plaintiff McCartney did in 1968, compete for the nomination of a major party and if he succeeds, he would have of course get the full entitlement of the funds.

If he prefers the nomination of the minor non qualifying party, Chapter 95 permits its candidate as well as those who are entitled to some public financing, but less than the full allotment to continue to raise private contributions, while it requires those who qualify and except the full 20 million not to raise any private contributions.

So that any small party or no party candidate will demonstrate sufficient strength, will be free to raise pre-election funds commensurate with that strength and as was noted a few moments ago, George Wallace did precisely that in 1968.

He raised almost \$7 million which was 12 ½ % of what all presidential candidates raised at a time when he accounted for 13 ½% of the total presidential vote and certainly a lot of that strength was visible before the election and that is why he was able to raise the money.

More --

Potter Stewart

In other words, Mr.-- are you directing yourself Mr. Cutler to the situation where a candidate runs in let us say Democratic party primaries in the various states?

Well, some runs well and some runs badly in others and then at the Democratic National Convention he is not nominated and then that same man decides to run as a no party person, an independent person, what happens to the matching funds that he has collected as a primary candidate if they are unexpended?

Lloyd N. Cutler

I have to admit Justice Stewart that is a question I have not thought of that any candidate would have money spend it matching (Voice Overlap)

Potter Stewart

Money spent (Inaudible) speculative situation?

Lloyd N. Cutler

No, but I would think his funds are his funds if he was running in the primary and that they would be available to him thereafter and certainly he could thereafter running as an independent and having run as an independent, he might make himself eligible for funds in the next election.

I would like to deal very briefly if I could with the point that post election financing is illusory because it can only be used to repay loans.

Well, of course, it is perfectly possible to raise money before the election on a contingent loan basis.

Many, many contributions so called are given in the form of loans to be repaid, if the candidate is in a position to repay those loans.

Potter Stewart

Incidentally, this is taking us back to the subject to this morning.

Are these limitations on contributions and on expenditures, contributions particularly, do they cover loans or do they deal with loans?

Lloyd N. Cutler

Loan, a contribution includes a loan --

Potter Stewart

It does.

Lloyd N. Cutler

-- except for this particular purpose of defining what a recipient of post election public financing can spend.

He may repay, use some of that money to repay a loan and that loan is excluded from the definition of contribution for that purpose.

Potter Stewart

Just for that purpose?

Lloyd N. Cutler

Right.

I would like to go very briefly to plaintiff McCarthy who says that he can never be entitled to this public financing he sustains because he is not a party candidate.

The answer to that as the Court of Appeals indicated is there is no definition of party in this portion of the statute.

He has a committee for a constitutional candidacy, I believe it is called McCarthy 1976.

That committee could very well be defined as a party and the FEC is holding rule making proceedings considering that very issue right now.

I have not had time to get to the less restrictive means of the voucher plan and the tax return check off.

I would like to discuss them if I could just vary briefly.

The voucher plan has a number of difficulties of which the most significant is the danger of block trading of vouchers, vouchers would be like money people could buy them.

They would also be very high administrative cost in dealing with vouchers worth only \$1 or \$2 that cost in collecting those, might very well turn out to be more than what they would be worth in the end.

So far as the check off for a candidate of your choice is concerned, since the check offs are keyed to the four tax dates, it is not even clear on the last of those dates April 15, 1976 who the candidates are really going to be.

Moreover, Congress wanted and I think, again this was a legitimate congressional purpose to have equal allotments of funds to any party that got over 25% in order as much as possible to balance things out for a two or three party race in the next election and a candidate of your choice check off provision could not be accommodated to that sort of a system.

Lastly there is to matching suggestion which is not advocated by appellants because they object to matching on other grounds, but it is suggested by the Attorney General and matching, we submit suitable as it maybe for the primary period is wholly unsuitable for the regular election for the very same reason I have mentioned earlier, Mr. Justice Rehnquist, for legitimate interest of either the Federal Government of the State Government in trying to develop some kind of a majority choice at federal election.

So a proliferation of many, many candidates in the final election is something Congress, we say, could constitutionally prefer not to encourage.

Finally, with respect to the primary system, the matching for primaries, we will have to rely on our briefs for most of that, but I do want to point out to the Court that there is not a single plaintiff before it who intends to enter the primaries or who has pleaded that he intends to do that.

Of all the hypothetical issues raised in this case, all put before you by non plaintiffs or involving non plaintiffs, the one least related to these particular plaintiffs is entering a national primary.

William H. Rehnquist

Mr. Cutler, in view of your contentions about standing, it becomes fairly important whether this public financing question is regarded as a First Amendment question or a Fifth Amendment question, does it not, because ordinarily we would not apply overbreadth if we just to have Fifth Amendment?

Lloyd N. Cutler

Well, certainly the appellants have raised First Amendment issues which I did not cover, namely these establishment clause issues.

That aside, we would argue it is essentially a Fifth Amendment rather than a First Amendment question.

Thank you very much.

Warren E. Burger

Very well, Mr. Cutler.

(Inaudible) reserve five minutes for rebuttal.

Brice M. Clagett

Thank you Mr. Chief Justice.

One of Mr. Cutler's last point was that the check off was impractical because designations are key to the April 15 income tax date.

The answer to that is found in our brief.

There is no reason in the world why there need be.

You could have a check off, which was made by a separate form immediately after the nominating conventions for example or something of that nature and that could apply for all the four years.

You would not have a \$1.00 check off every year, but a \$4.00 check off say immediately after the conventions and election years.

It is perfectly practical simple system which would avoid all this business of Congresses deciding who gets the money and when and what basis.

It would maybe mean that the Government was acting as a simple conduit for money that went from the taxpayers.

William J. Brennan, Jr.

Are you going to address the (Inaudible)

Brice M. Clagett

Yes, Your Honor.

We definitely have a First Amendment argument as well as a Fifth Amendment argument here.

If you consider for example your decision in International Machinists Association versus Street where you held that it violated First Amendment freedom of speech for a labor union with the union-shop contract to spend members' dues to support political candidacies with which some members disagreed.

Just here, tax funding is used to pay candidates without reference to which candidates, the taxpayer wishes to support.

Appellees' argument that the check off is voluntary is wholly beside the point.

A taxpayer not checking off does not have his taxes reduced.

The money for the fund comes out of the general treasury and thus is involuntarily contributed by all taxpayers.

Potter Stewart

Well, Mr. Clagett, this constitutionally equivalence simply to in appropriation by a Congress from the general funds --

Brice M. Clagett

No.

Potter Stewart

-- stands for this purpose?

Brice M. Clagett

No because --

Potter Stewart

What does the check off really constitutionally have to do with this?

Brice M. Clagett

No, the check off is illusory that is my whole point --

Potter Stewart

(Voice Overlap) one of my question.

Brice M. Clagett

It is just like a general appropriation.

It is just like the appropriation out of its general funds that the labor union made in the Street case and what made that unconstitutional was that money was being used to support some and not all political speech, without regard to what political speech the people's money it was wished to support.

Potter Stewart

Well, is it not the essence of Majoritarian Government, Mr. Clagett to have Congress appropriate money for variety of different purposes that many taxpayers think is quite wrong?

Brice M. Clagett

Yes, Your Honor and the Street decision made the same distinction.

It said we are not saying that in labor union cannot dues and do lots of things with which individual union members disagree.

The one thing it cannot do, you held was to subsidize political speech with which some members disagreed to support political candidates with which some members disagreed.

You said that was different.

That posed a First Amendment problem.

We think exactly the same analysis applies here.

Byron R. White

Did the Street suggest that a labor union could not solicit from its members contributions for political purposes?

Brice M. Clagett

Not at all Justice White.

Byron R. White

And that did it suggest that if it did solicit for political purposes it can only spend it for the particular candidates that individual contributors designated?

Brice M. Clagett

No sir.

This was dues that I was talking about.

Just as here we are talking --

Byron R. White

And also the dues that law required them to collect?

Brice M. Clagett

Yes sir.

Byron R. White

It was not just some voluntary item.

It was -- because the force of law was behind them?

Brice M. Clagett

That is absolutely correct, just as here the collection of taxes as the force of all behind it and the check off is academic because the money comes out of the general treasury.

William J. Brennan, Jr.

They not be that separate Mr. Clagett, but there of course the remedy was for the attack of the union member to get it back.

Here, he may check off or not as he pleases, but it does not get his dollar back.

Those in the general treasury is taxed.

Byron R. White

And he certainly has not consented to the legality use for political -- to subsidize political speech?

Brice M. Clagett

The people who have not checked off, have not consented to that and it is their money that is really being used, that is my point.

Byron R. White

A person who checks it off, however, is --

Brice M. Clagett

He has consented.

Byron R. White

He has consented.

Brice M. Clagett

He has consented, there is no question.

Byron R. White

But if other people complain because there had not been a check off, this would be in the general fund.

Brice M. Clagett

That is correct.

Byron R. White

Somebody else's taxes are being reduced?

Brice M. Clagett

That is exactly right.

Warren E. Burger

All of those problems would have been resolved, would they not largely, if not all, if the check off had been to add a dollar to the taxpayer's bill and then give that money to this general fund?

Brice M. Clagett

Yes, Mr. Chief Justice.

We would have no problem with that.

Along the lines I have indicated if it resulted still in the money being paid out pursuant to an allocation by a Congress, we would still have at least the discrimination point and perhaps more.

Warren E. Burger

Your time has expired, Mr. Clagett.

Brice M. Clagett

Yes, one final word on this credit point that Mr. Cutler mentioned.

The exemption of loans from the contribution definition or rather from the contribution limits for post election funding applies only to bank loans and banks are not going to lend money to new or minor political parties without a guarantee and the contribution limit does apply to the guarantee.

Therefore, the remedy Mr. Cutler suggests is utterly illusory.

Lewis F. Powell, Jr.

Mr. Clagett one final question.

You are not saying as I understand your position that public financing by the government, rather the general treasury for example is invalid per se, you are saying it is invalid when it is discriminatory?

Brice M. Clagett

We do not believe there can be a non discriminatory system.

Lewis F. Powell, Jr.

Oh! You do not?

Brice M. Clagett

No, we do not.

Lewis F. Powell, Jr.

No way?

Brice M. Clagett

No way, but this certainly is not is one that comes closest to it.

I can think of a lot less discriminatory ones than this.

Potter Stewart

But as I understand from your brief at least that you say that even assuming there could be a non discriminatory system, it is nonetheless unconstitutional, violative of the First Amendment?

Brice M. Clagett

Yes sir and one --

Potter Stewart

(Voice Overlap) say that?

Brice M. Clagett

Indeed and one reason I suggest that is that in Ripen Society case, the DC circuit just a couple of weeks after it decided this case, said that this very public financing scheme probably turned all political party activities in to state action --

Potter Stewart

Right.

Brice M. Clagett

-- for Fifth and Fourteenth Amendment purposes.

And in Cousins v. Wigoda and the O'Brien versus Brown, you expressed great concern that political parties have some substantial measure of control over their own affairs.

This would destroy all that.

That is one of the several reasons why do we believe that yes it is per se unconstitutional.

Warren E. Burger

You may now proceed to your argument chief and then on the third point Mr. Clagett?

Brice M. Clagett

Yes sir.

This part of the case presents the questions whether Congress may establish to administer and enforce the federal action law with the complete panoply of powers appropriate to that end.

An agency which is neither part of the executive branch nor an independent agency, but rather an alter ego of Congress itself which the Commission has conceded to be.

No one, I think denies that the question is substantial and indeed serious.

Certainly Congress' normal function in our constitutional scheme is the pass laws, not to administer or enforce them.

It is urged at the outset that these questions are not ripe for decision and that we have no standing to raise them.

I turn then first to rightness.

Insofar as we attack the method of appointment of the Commission, it is right to exist is constituted.

We are talking of course about appointments which were made many months ago.

The Commission is so appointed as in full operation.

Everyday it is taking actions which have vast impact on the political process.

William H. Rehnquist

But I would think Mr. Clagett that if you were to be able to challenge that without the Commission ever having done anything to any of your clients, you would have to validate virtually a taxpayer's action for the Federal Government which this Court has never done?

Brice M. Clagett

Not at all, I submit Justice Rehnquist.

The appellants are all members of the class which have a right to seek advisory opinions.

As political candidates and parties and committees, they are directly impacted by the Commission's rules and regulations.

The Commission has done things that effect them directly and which harm them.

Just two or three examples, as challengers which most of these appellants are and as parties an interest supporting challengers, these plaintiffs are drastically injured, not by what the Commission did ironically in the office account rule, but in Congress' veto of that rule which the Commission passed.

The Commission passed the rule which would to some slight modest extent had mitigated incumbent advantages, and therefore, benefited the appellants and Congress used the legislative veto on it.

So the result of the establishment of the Commission as a legislative agency and subject to the legislative veto is that appellants were injured.

William H. Rehnquist

But they not injured not by the action of the Commission, but by Congress' action over turning the Commission?

Brice M. Clagett

They were injured by the establishment of the Commission, by the vesting of enforcement and interpretation parallel to this statute, in an agency which could not insist on its own rule, but which was subject to Congress' legislative veto.

William H. Rehnquist

But then that stems from the availability of the veto and not the composition of the Commission?

Brice M. Clagett

What we challenge is the Commission as a legislative agency.

It is made in legislative agency by several things, but essentially by two things.

First, the appointment powers, second, the legislative veto.

In this particular instance it was the legislative veto that was the more conspicuous element of legislative control.

This is not the only thing the Commission has done that hurts appellants.

The advisory opinion, subjecting lawyers and accountant's fees to the expenditure limits which came down about ten days ago I believe and which we have lodged with the Court, was as the two dissenting Commissioners said terribly hostile to the interest of new comers and challengers to the political scene, who have greater burdens in trying to figure out what this legislation means and to comply with it than incumbents do.

This advisory opinion expressly injured challengers directly in that sense. Senator McCarthy, the Commission has tried to audit him.

They have threatened him with the use of their civil enforcement power.

They backed off a bit after this litigation terminated query whether they will continue backing off on that.

Certainly he believes that he is directly injured by attempts to audit him to find out the identity of his contributors down as low as \$100.00 and so on.

The disclosure regulations which there is just a notice so far and they have not been formerly adopted yet, the great burdensomeness of those of those regulations, what a number of observers have called the almost incredible complexity and the new conditions, the new requirements that the Commission is planning on top of the statutory requirements.

For example keeping photostats of every check which there is nothing about in the statute.

These similarly impact directly on appellant's to the extent that they have to file reports which they almost all of them do.

They have filed them and they injure appellants certainly insofar as they are challengers and new comers.

It emerges clearly from the statutory scheme that the law is to be administered and enforced primarily by the Commission itself through a whole spectrum of powers.

Statements of general policy, both interpretative and substantive rule making, advisory opinions, entertaining complaints, conducting investigations and audits, holding hearings on complaints and undertaking conciliation procedures, that battery of powers and the overwhelming majority of cases should be sufficient to compel the compliance with the Commission's view of the law.

Resort to a civil enforcement proceeding or they are brought by the Commission itself or by the Attorney General at its direction should rarely be necessary.

The bulk of these powers have already been exercised.

The Commission has made rules.

It has issued advisory opinions.

It is administering the federal subsidy provisions, certifications and what not.

It has also investigated complaints, and conducted audits and it has we are informed, procured compliance with its views, through conciliations proceedings in at least 50 cases so far.

Those proceedings are secret, so they are not announced to the public, but were told there have been at least 50 of it that have been brought to conclusion so far.

The Commission is even exercised the power of which the Commission's counsel tells you, the Commission does possess, that is the power to issue rules governing both the meaning and the administration of the expenditure and contribution limits.

I confess to a lively curiosity as to what precious Spritzer is going to tell you about that.

But as to all the powers except for rule making and bringing enforcement proceedings, the Commission and its counsel are in agreement that they apply to the expenditure and contribution limits as well as to the disclosure provisions.

In any event, Congress gave the Commission all of its powers.

Those exercised and those few such as the power to disqualify a candidate which are yet unexercised and the issue here is the facial constitutionality of legislation which does that when the depository of power is an arm of Congress.

Can Congress validly set up this sort of agency with all these statutory powers by this method of appointment and subject to this legislative veto --

William H. Rehnquist

Well, you say the facial constitutionality, now what does that mean outside of the First Amendment area?

Brice M. Clagett

Separation of powers, Justice Rehnquist.

William H. Rehnquist

Would you say that there is no need for the person challenging the Commission to have been affected or be in a controversy with that if he challenges the separation of powers?

Brice M. Clagett

Well, that is a standing question and as to our standing, the Court of Appeals of course had no problem with it.

The citizen or taxpayer analogy we think it certainly wrong.

I have mentioned the number of aspects where we have been hurt by specific things that the Commission does, but even beyond that, separation of powers was not put into the constitution for the benefit of federal office holders.

It was put there to avoid tyranny that is what Madison said.

He said if the legislature determines the powers the honors and the emoluments of the office, we should be insecure if they were to designate the officer also.

Now, we think this case is just like Glidden company versus Zdanok.

There, the litigant was held to have standing to raise the article three question because the Court held that the article 3 provisions were put in there, at least to impart for the benefit of litigants.

William H. Rehnquist

But of he had a case decided against him on the merits by the Court, including a judge of who may complain?

Brice M. Clagett

Yes sir.

William H. Rehnquist

And my question really is not so much to suggest that you do not have an actual case or controversy, but why do you refer to it as a facial attack?

If in the fact the Commission has harmed you, why do you need to talk about the facial on constitutionality?

Brice M. Clagett

We think the Commission harms this by existing in violation of the separation of powers and exercising regulatory control over us which it is doing everyday.

We have had to file reports with them.

We are subject to their opinions.

We are subject to their rules.

If we do something they do not like they will take us through this conciliation proceedings and if we do not knuckle under them then they will take this to the Court or have someone else do so.

Now, it is particularly poignant I think on that point that although far from necessary to our standing that appellants represent primarily challengers and new comers to the political process and we say that by having these laws administered by a legislative agency, Congress has deliberately retained enormous discretion, power and control over the enforcement and administration of these statutes which turn so sharply on the comparative fairness and equity as between challengers on the one hand and incumbents on the other.

One side has retained the power not only to set, but to administer and enforce the rules of the political game.

As challengers are newcomers, we think we have to have standing to question that and we do not think it goes anywhere near as far as standing in great many of your cases.

As to the merits, once the Commission is conceded to be a legislative agency which can do nothing that Congress could not do itself, how can its appointment and powers and the legislative veto possibly be justified?

The Commission's answer is that there is something special about political campaigns which makes regulation of them different from every other subject to federal law.

Potter Stewart

Beside and before you get that you say what is considered to be a legislative agency?

You say it is a legislative agency.

Brice M. Clagett

Yes.

Potter Stewart

Because of its membership, because of who appoints its member or majority with this membership?

Brice M. Clagett

Who appoints the membership –

Potter Stewart

Functions which are --

Brice M. Clagett

Who appoints the membership plus the legislative veto.

There is ancillary things, for example, the oversight of budget functions which congressman Hayes has so vividly said is going to be used of the hell, but that is some to some extent at least prove any further plaintiff.

Potter Stewart

For the plenary of the majority of its members are appointed by the Congress to ex-officio --

Brice M. Clagett

Yes.

Potter Stewart

-- agents of Congress are members?

Brice M. Clagett

Yes.

Potter Stewart

And then four others out of the total of eight --

Brice M. Clagett

Yes.

Potter Stewart

-- six voting numbers are appointed by the Congress, that is one reason?

Brice M. Clagett

And all six are confirmed by both Houses?

Potter Stewart

Right and then the other reason you said is, it is because Congress has an absolute veto of everything, anything it does?

Brice M. Clagett

Exactly.

Potter Stewart

Anything important it does?

Brice M. Clagett

Exactly.

William H. Rehnquist

And it is not -- Congress is one house, is it not?

Brice M. Clagett

Excuse me?

Either House, yes, Justice Rehnquist either house.

William J. Brennan, Jr.

How is all the members of the presidential appointees, but either House could veto now and then?

Brice M. Clagett

We think it would then be an executive agency, but the legislative veto would be bad.

William J. Brennan, Jr.

It is just the legislative veto itself renders this --

Brice M. Clagett

Yes.

William J. Brennan, Jr.

-- scheme on constitution.

Brice M. Clagett

Oh! Yes, we think so, Your Honor.

Byron R. White

And insofar as it relates to enforcement?

Brice M. Clagett

Yes.

Byron R. White

Would you say that if it were an executive agency, but the Congress retained the power to veto a regulation?

Brice M. Clagett

There has been a great deal written about that sir.

Byron R. White

So what is the answer?

What do you say the answer should be here?

Brice M. Clagett

I am sort of a purest about it.

I think they are unconstitutional.

Byron R. White

But even the Congress gives an agency power to strike out the statute by a regulation?

Brice M. Clagett

Yes.

Byron R. White

But Congress says we want you to submit it to us first to see if it really conforms with our legislative intent?

Brice M. Clagett

Yes.

Byron R. White

You say that is unconstitutional?

Brice M. Clagett

Yes because Congress --

Byron R. White

You know the President and the President cannot require it?

Brice M. Clagett

The president cannot --

Byron R. White

President could not require it?

Brice M. Clagett

Could not require what?

Byron R. White

An independent agency could not require them --

Brice M. Clagett

No.

Byron R. White

-- to submit some regulation to him?

Brice M. Clagett

That is correct.

William H. Rehnquist

Because if you are right --

Brice M. Clagett

But the President can, the President is entitled to participate in the making of new law.

Byron R. White

Maybe our rules, maybe the rules of procedure of the constitution?

Brice M. Clagett

Well, that does not post in executive legislative --

Byron R. White

Yes.

Brice M. Clagett

-- problem in any of that, yes.

Byron R. White

The judicial --

Brice M. Clagett

Yes.

Byron R. White

-- the legislative one --

Brice M. Clagett

Yes.

William H. Rehnquist

If you right all the associate Justices of this Court would apparently still be making \$39,000.00 a year, would they not?

I mean, all the Federal salary act provides for one House veto?

Brice M. Clagett

Justice Rehnquist, the legislative veto can arise in a great number of different contexts.

For example, in the executive agreement context which so much has been written about, there it is a question of whether Congress is unduly intruding into the foreign affairs power.

There is no question of that sort here.

In some circumstances, it can arise when Congress is essentially making new law, or passing new statutes and there it has to have the concurrence of the President.

Here you have the legislative veto added to the appointment mechanism and we think that those two things put together, clearly make this Commission an arm of Congress, a legislative agency.

Now, all parties are agreed as to that.

The question then becomes, can a legislative agency, can an arm of Congress perform the functions, exercise the powers which Congress has been given here?

Could Congress perform these functions directly and if not, can it perform them through its controlled agent?

In other words, you do not, to resolve this case, have to hold that the legislative veto either as a general proposition or even in this one manifestation is itself unconstitutional.

The legislative veto comes in as one of those facts of life which make the Commission an arm of Congress and the question becomes whether the power, whether an arm of Congress can do this.

Byron R. White

Just give me one example of what has the Commission done to you specifically, which in so doing represents a legislative rather than an executive function, whereas in executive function or the legislative function?

Brice M. Clagett

They are executive functions.

Byron R. White

Yes.

Brice M. Clagett

But it cannot.

Byron R. White

Name me one, name me one.

Brice M. Clagett

Alright, the advisory opinion on attorneys' and accountants' fees.

Byron R. White

Well now, that would be no difference in a regulation, would it?

Brice M. Clagett

It could have done it by regulation, we assume it will.

Byron R. White

So it is really -- so you put that in a same category as the Congress retaining the power to pass on a regulation?

Brice M. Clagett

Yes sir.

Byron R. White

But it is no worse than that?

Brice M. Clagett

Well, it will all depend on --

Byron R. White

Is there anything any closer to sort of an enforcement action?

Brice M. Clagett

Oh yes!

Byron R. White

What is it?

That has not done any of these plaintiffs?

Brice M. Clagett

Well, they asked to audit Senator McCarthy's records. Senator McCarthy said, "I object!" They wrote back and this is on appendix to our brief, our first brief, not the reply brief.

They wrote back a letter which is attached there, it is page B 1 and B 2, the very last page of our first brief, in which they send, the Act assigned civil jurisdiction to the Commission of all apparent violations of the Act and of and then it goes and lists the expenditure and contribution limits and we have a right to conduct audits and so forth and we are charged to correct any apparent violations by informal methods of conciliation and if that does not work, we can bring an enforcement proceeding.

Warren E. Burger

You are saying the enforcement proceeding function is exclusively an executive function?

Brice M. Clagett

To enforce compliance with criminal statutes, yes Mr. Chief Justice, indeed, I am.

Byron R. White

Including the investigative, the enforcement investigative functions?

Brice M. Clagett

Yes indeed.

We see no reason why Congress directly or through an agent can go around investigating alleged violations of the election law any more than the account of the thrust law for purpose and enforcements.

Byron R. White

Except for legislative purposes?

Brice M. Clagett

Except for the legislative purposes.

Byron R. White

Right.

Brice M. Clagett

And that is -- yes sir.

Thurgood Marshall

(Inaudible) you say the statute is basically unconstitutional and all you bring us is what the Commission has done.

Does that have anything to do with whether it is spatially unconstitutional or not?

Brice M. Clagett

The statutory language gives the Commission power to do those things, some of which it is done, some of which it has not done.

We think that it is--

Thurgood Marshall

Are we free to interpret that without considering what the Commission has tried to do or do we have to be bound by what the Commission has done?

Brice M. Clagett

We think the former, Your Honor.

You can consider not only those powers which the Commission has exercised, but those which it has.

It has exercise most of them.

There are only two as far as I know.

Thurgood Marshall

You included that statement of the Commission and all in some memorandum I saw the other day.

You also referred us to New York Times or do you want us to consider that too, while we are at it?

Brice M. Clagett

I think that was in the subsidy Section, was it not?

We think that all you need is the statute.

All you need is the statute, the powers which are given and the qualities that make it a legislative agency all are plain and set forth in the statute.

The only reason I have dwelt to any extent on what the Commission has done is that rightness in standing had been raised as issues.

Warren E. Burger

How would you classify the power to strike the candidate from the ballot in which of the three categories, say that falls?

Brice M. Clagett

I would have to put that in the fourth category Mr. Chief Justice and say that if something that no one can do, whether the executive, the legislator or the judiciary and I think Powell versus McCormack stands for that proposition.

It addressed to the later stage of the stage of exclusion, but if you can exclude a member when he comes for the house with the qualifications and the credentials I do not see how either Congress or anyone else could strike him off the ballot.

Warren E. Burger

And you do not think that judicial review saves it any, the initial power of arrest with the Commission?

Brice M. Clagett

No, I do not think that saves it all, Mr. Chief Justice.

It seems to me to be a power which the constitutional convention is quite clear.

It should not be exercised by anyone.

All the comments of the framers which are set out at such great length in Powell versus McCormack to the effect that it must be the people who chose their representatives and if there to be any limitations on who can become representatives, it must be the constitution itself which imposes them and no others, no others can sneak in there in any way whatsoever.

Madison and Hamilton were both crystal clear about that and it is all set forth in Powell versus McCormack and we think it follows necessarily from that that the disqualification power is on constitutional.

Warren E. Burger

Now, what about a candidate who demonstratively not eligible to be a candidate?

This was not a citizen of the United States for an office which requires that.

You say no branch of the government will have any power to take him off the ballot?

Brice M. Clagett

Well, there is no question that the house of course can exclude him --

Warren E. Burger

After he is elected?

Brice M. Clagett

-- after he is elected.

The question then becomes whether one branch and if so which one could anticipate that and say we do not want you cluttering up the ballot when you are sure to be excluded when you show up.

I have not -- I cannot say -- I thought exhaustively about that question.

But the answer that immediately suggests itself for me, is that that should be left to the house at the time he shows up.

That it is to that house that the enforcement of those constitutional qualifications have been given and for anyone else to take him off the ballot would be to make someone other than the house, the judge of the qualification of its own members.

Warren E. Burger

You mean that would be like the candidates who were refused to their seats because they held Commission as generals or in one case they held the Commission as the United States attorney with the same kind of mechanism?

Brice M. Clagett

Yes sir.

Harry A. Blackmun

Did you go so far as to a residential requirement?

Brice M. Clagett

Our residential requirement is one of the constitutional requirements I believe.

Harry A. Blackmun

Yes, but do you think anyone that no branch of government have government could enforce that except the house itself to which the person is elected?

Brice M. Clagett

Well, the state can certainly keep him off the ballot, and I assume would do so.

Harry A. Blackmun

Well, it succeeded in doing so in one of the Carolina last time, did it not?

Brice M. Clagett

I am not familiar with that Your Honor.

Oh! Yes, of course I know yes, the governor --

Potter Stewart

About the candidate Presidency who is not a native born citizen of the United States, natural born, excuse me, natural born citizens?

Brice M. Clagett

I would think in pursuant of its power to regulate the time, place and manner of elections, Congress could certainly set up some mechanism to be administered by someone other than itself to make sure the people like that did not get on the ballot.

There is no question that the power -- that the federal power -- congressional power over elections is very broad, but it is a legislative power.

It is to be exercised by a law and there is all the difference in the world between saying that the Congress can legislate broadly on the subject on one hand and saying that it can retain to itself the enforcement within the administration power.

That is what wrong with the statute and the disclosure provisions do not have anything to do in our submission with the information gathering function on the ground that they are justified under.

Appellees themselves and Mr. Friedman this morning made it perfectly clear that legislative oversight is not the reason for the disclosure provisions.

The reason for the disclosure provisions are first to inform the public and second to enforce the contribution and expenditure limits and to call everything that the Commission does in the way of enforcing the disclosure provisions, mere information gathering is just we think completely spacious, they are just administering those as just as bad as administering the expenditure and contribution limits directly.

Warren E. Burger

Mr. Spritzer.

Ralph S. Spritzer

Mr. Chief Justice and may it please Your Honors.

I would like to take a moment at Mr. Cutler's request to provide an item of information in response to a question asked earlier I think by Justice Stewart.

He would like to point out that it is Section 9038 (b) (3) which deals with matter of unexpanded primary matching funds and it does require that they be returned.

I propose of course to address myself to the question of the legitimacy of the Commission and of the powers that has been accorded it by the legislation.

And we do think as Justice Rehnquist's questions have highlighted that there is a question of standing with respect to this part of the case which does lie at the threshold and does have to be addressed here.

By and large appellants accept the view that if this Commission had been appointed, all of its members by the President, that it would be able to exercise the powers that have been accorded it.

Warren E. Burger

Did he answer that?

Ralph S. Spritzer

There maybe an exemption, excuse me --

Warren E. Burger

And the answer to that is the absence of the veto power also, I thought it coupled the two?

Ralph S. Spritzer

He did Your Honor, but I think at least the fundamental objection to this Commission's legitimacy is they put it into it having particular powers and I shall come to this veto, legislative veto point also.

I think their fundamental concern is the claim that this violates the President's constitutional prerogatives to appoint officers of the United States.

And our point as to that is that it is hard to see how appellants have standing to act here as the President's champion because this is a question which goes solely to the allocation of the appointed power within the federal establishment.

There is no question here, that all of these commissioners meet the statutory qualifications and when Mr. Clagett says that Commission is engaging in various forms of regulation it does not seem to us that supports an attack upon the legitimacy of the Commission because the allocation of the appointive power is between the President and the Congress is not designed for the protection of the public at large or taxpayers or of citizens and of course there is remedy here.

Potter Stewart

If this Commission is doing something to restrict anyone of these plaintiffs, indeed then surely the plaintiffs have standing to attack the constitutional validity of the Commission and they are not being champions of the President, they are being champions self-appointed, if you will, of the constitution?

Ralph S. Spritzer

Insofar, Your Honor is they are claiming that any action by the Commission violates a power that an agency can exercise or that the Commission has gone beyond the statute, I fully agree.

Insofar as the challengers bait solely on the proposition that the appointments were made by the President, I think we have a quite different question.

A question much like ex-parte letter in which a member of the bar sought to challenge a Justice of this Court on the ground that appointive process was defective.

Potter Stewart

Probably this Court have not done anything to that?

Warren E. Burger

Has not this Commission undertaken to do or something to Senator McCarthy already?

It made demands on him of some kind.

Ralph S. Spritzer

Oh! I have question for a moment Your Honor that this Commission has functions to perform and if any of the actions which it takes or orders it issues or regulations which it should promulgates are unconstitutional for reasons apart from the question as to the allocation of the appointive power that they can be raised.

William H. Rehnquist

How about Glidden against Zdanok?

Warren E. Burger

That is only the question that Senator McCarthy could raise, just the power of the Commission to ask him some questions?

Ralph S. Spritzer

He can raise any question going to the constitutionality of action taken by the Commission which effects him.

William H. Rehnquist

Mr. Spritzer.

Ralph S. Spritzer

Yes.

William H. Rehnquist

How about the Glidden against Zdanok?

There the claim was it not that the Court of Appeals had made an improper decision for other reason, but there was judge who was sitting on it who had no business sitting there?

Ralph S. Spritzer

Quite so and I think the Court was at pains to point out in Glidden that the provision for life tenure is for the benefit of litigants and that that was an exception to the general rule of standing that the a party is required only to raise his own interests and not a claim that somebody else's prerogatives have been impinged.

William H. Rehnquist

How about with the cases like United States against Musgrave where they said the original Court of Claims could not be ask to do what it did?

That was a litigant challenging, was it not?

Ralph S. Spritzer

And I think the litigant could challenge just as he could challenge the failure of a judge to have life tenure in Glidden, the jurisdiction of the Court.

But there is no question here that the commissioners here meet the statutory qualifications.

The sole claim is that by adopting the method of appointment that it did, Congress impinged on executive prerogatives.

William H. Rehnquist

Oh! There was no question in Musgrave that the judges of then Court acclaims met the statutory qualification, but this Court held that was not enough, there was constitutional problem?

Byron R. White

it is just a claim Mr. Spritzer of saying that this is a legislative body that can do some things, but it has many jurisdiction to perform some of the functions that are assigned to it and some of the functions it does not have jurisdiction to perform?

Ralph S. Spritzer

Well.

Byron R. White

Or being exercise against these plaintiffs?

Ralph S. Spritzer

Well, I certainly do not stand, though I think it is essential to raise it since it is a jurisdictional question on the standing question alone and indeed there are three propositions that I hope to develop in my remaining time.

The first proposition is that Article 2, Section 2, Clause 2, the Section of the constitution dealing with the appointment power is not preclusive of congressional authority to make appointments to offices where it appears that the function of those officers is substantially related to a constitutional responsibility of the Congress.

The second proposition we hope to develop is that the Congress has unique and pervasive responsibilities which are not confined solely to passage of legislation in relation to the federal electoral process.

And that leads us to the third proposition, that the powers which have been accorded to this Commission that an examination of them shows that they are substantially related or incidental to those constitutional responsibilities of the Congress.

It is true of course that Article 2 does provide for appointment of officers of the United States by the President.

It then does go on, however, in the but clause with which Your Honors are familiar to state that Congress made by law vest the appointment of such inferior officers as they think proper in the President alone in the Courts of law or in the heads of departments.

And we think it is fairly implicit in that Section, at least when it is read in the light of constitutional history and practice and the number of decisions of this Court that though Congress is not expressly granted the same power --